SUPREME COURT, U.S.
FILED
JUL 2 3 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1955

No. 267

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, JOHN W. NELSON, individually, and as President of UE LOCAL 506, on behalf of himself and all other employees of the General Electric Company similarly situated,

Petitioners,

v.

GENERAL ELECTRIC COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BASIL R. POLLITT,
11 East 51st Street,
New York 22, N. Y.,

FRANK DONNER,
ARTHUR KINOY,
MARSHALL PERLIN,
342 Madison Avenue,
New York 17, N. Y.,

Counsel for Petitioners.

INDEX

	PAGE
The Opinions Below	1
Jurisdiction	2
Questions Presented	3
Constitutional Provisions and Statutes Involved	3
Statement of the Case	4
The Events Giving Rise to this Proceeding	4
The Contract Provisions	7
The Proceedings Below	7
The District Court Decision	8
The Court of Appeals Decision	8
The Rulings at Trial	9
Reasons for Granting the Writ	12
The Primary Jurisdiction Question	12
The Misinterpretation of Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.	17
The Senate "Privilege"	19
District Court Jurisdiction to Settle the Whole Controversy	23
The Value of Nelson's Job Right	24
The Fifth Amendment Privilege	25
The Employer's Breach of the Recognition Clause	31
	31
Conclusion	32

PAGE

Appendix A—Opinion of United States Court of Appeals, District of Columbia Circuit 1a

B—Opinion and Order of the District Court 5a

C—Contract Provisions 22a

Cases Cited

Amalgamated Utility Workers v. Consolidated Edison Co., 307 U. S. 261 17

Ass'n of Westinghouse Salaried Employees v. Westinghouse Electric Corp., 348 U. S. 437 .....9, 17, 18

Beeler v. Chicago R. I. & P. Ry. Co. (C. A. 10, 1948), 169 F. 2d 557 27

Bell v. Phila. Life Insurance Co. (C. A. 4, 1935), 78 F. 2d 322 25

Boeing Airplane Co. v. Aeronautical Industrial District (D. C. Wash., 1950), 91 F. Supp. 596, aff'd 188 Fed. 356, cert. den. 342 U. S. 821 ..... 16, 17

Campbell v. I. A. M., 337 U. S. 521 15

Carroll v. Somervell (C. A. 2, 1949), 116 F. 2d 918 .. 24

Coyle v. Erie R. Co., 142 N. J. Eq. 306, 59 A. 2d 817 27

Earle v. Illinois Central R. Co., 25 Tenn. App. 673, 167 S. W. 2d 15 27

Emspak v. U. S., 349 U. S. 190 27

Farris v. Alaska Airlines (D. C. Wash., 1953), 113 F. Supp. 907 27

Garner v. Teamster's Union, 346 U. S. 485 ..... 15, 16

General Motors Co., 81 N. L. R. B. 779, enf'd (C. A. 2, 1950), 179 F. 2d 221 31

PAGE

Hague v. C. I. O., 307 U. S. 496 23
Hillsborough Township, Somerset County v. Cromwell, 326 U. S. 620 23
H. J. Heinz Co. v. N. L. R. B., 311 U. S. 514 ..... 14, 31
Houde Engineering Corp., 1 N. L. R. B. (old), 35 (1934) 31
Hurn v. Oursler, 289 U. S. 238 23

Illinois Central R. v. Moore (C. A. 5, 1940), 112 F. 2d 959 27
Independent Petroleum Workers of New Jersey v. Esso Standard Oil Co. (C. A. 3, June 26, 1956), — F. 2d —, 38 LRRM 2307 12
Inland Steel Co. v. N. L. R. B. (C. A. 7, 1948), 170 F. 2d 247, cert. den. 336 U. S. 960 31
Int'l Longshoreman's and Warehouseman's Union v. Juneau Spruce Corp., 342 U. S. 237 16

Johnson v. American Ry. Express Co., 163 S. C. 191, 178 S. E. 671 27

Kilbourne v. Thompson, 103 U. S. 168 19
Kingston Trap Rock Co. v. Int'l Union of Operating Engineers, 129 N. J. Eq. 570, 19 A. 2d 661 17
Klepinger v. Rhodes (C. A., D. C. 1944), 78 App. D. C. 340, 140 F. 2d 697 19
Koppal v. Transcontinental and Western Air Lines (C. A. 8, 1952), 199 F. 2d 117 27

MacKay v. Loew's Inc. (C. A. 9, 1950), 182 F. 2d 170, cert. den. 330 U. S. 828 18
Marshall v. Charleston & W. C. Ry. Co., 164 S. C. 283, 162 S. E. 348 27
Marshall v. Crotty (C. A. 1, 1950), 185 F. 2d 622 .. 24
Mastro Plastics Corp. v. N. L. R. B., 350 U. S. 270 .. 16, 17
Mays Department Store v. N. L. R. B., 326 U. S. 376 31

PAGE

McDonnell Aircraft Corp., 109 N. L. R. B., 930 14
Milk Wagon Drivers' Union v. Associated Milk Dealers, Inc. (D. C. Ill.), 42 F. Supp. 584 18

N. L. R. B. v. Crompton Highland Mill, 337 U. S. 217 31
N. L. R. B. v. Deena Artware, Inc. (C. A. 6, 1952), 198 F. 2d 645 16
N. L. R. B. v. Highland Park Mfg. Co. (C. A. 4, 1940), 110 F. 2d 632 15
N. L. R. B. v. Pacific Intermountain Express Co. (C. A. 8, 1955), 228 F. 2d 170 16
N. L. R. B. v. Sands Mfg. Co., 300 U. S. 332 14
N. L. R. B. v. Standard Oil Co. (C. A. 6, 1950), 196 F. 2d 892 12
Nord v. Griffin (C. A. 7, 1936), 86 F. 2d 481 24

Olsen v. Arabian American Oil Co. (C. A. 2, 1952), 194 F. 2d 477 27

Post Publishing Co. v. Cort (May 29, 1956), — Mass. —, — NE 2d —, 38 LRRM 2198 12

Quinn v. U. S., 349 U. S. 155 ..... 21, 27

St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U. S. 283 25
Slochower v. Board of Higher Education, 350 U. S. 551 ..... 25, 29
Siler v. Louisville & Nashville R. R. Co., 213 U. S. 175 23
Smith v. Whitney, 116 U. S. 167 24
Spielberg Mfg. Co., 112 N. L. R. B. 1080 14
Steadman v. Atlantic Coast Line R. Co. (C. A. 4, 1943), 138 F. 2d 691 27
System Federation No. 59 v. Louisiana & A. Ry. Co. (C. A. 5, 1941), 119 F. 2d 509 18

PAGE

Timken Roller Bearing Co. v. N. L. R. B. (C. A. 6, 1947), 161 F. 2d 949 14

Union Pac. Ry. Co. v. Olive (C. A. 9, 1946), 156 F. 2d 737 27
United Brick and Clay Workers v. Deena Artware, Inc. (C. A. 6, 1952), 198 F. 2d 637 16
United Construction Workers v. Laburnum Construction Corp., 347 U. S. 656 16
United Telephone Co., 112 N. L. R. B., 779 13

Winter v. Lefkowitz (Sup. Ct. Kings Cty., 1938), 6 N. Y. Supp. 2d 184 17

Constitutional Provisions and Statutes Cited

Fifth Amendment 3
Civil Rights Acts:
R. S. 1980, 42 U. S. C. § 1985(3) 4, 20, 33
National Labor Relations Act:
§ 10(a) (61 Stat. 146, 29 U. S. C. § 160(a)) 3
28 U. S. C. § 1343 (62 Stat. 932, 68 Stat. 1241) 4

Miscellaneous Cited

6 Cannon's Precedents 21
Cogley: *Report on Blacklisting,* Fund for the Republic (1956) 28
Cohen, *Law & Order in Industry,* 266 (1916) 26
3 Collective Bargaining Negotiations and Contracts (Bureau of National Affairs) 15
Hill and Hook: *Management at the Bargaining Table* (McGraw-Hill Book Co. 1945) 15

PAGE

House Conference Report No. 510 (80th Cong., 1st Sess.) 14
1 Moore's Federal Practice (1st Ed., 1948) 25
New York Times, April 10, 1956 ..... 22, 23
Note: 69 Harvard L. Rev. 725 14
Union Agreement Provisions (U. S. Dept. Lab. Bureau of Labor Statistics Bulletin No. 686) 15
Wigmore on Evidence 19
Wyle: *Unions in Search of a Forum to Enforce Contracts*, 7 Lab. L. J. 425 18

IN THE

Supreme Court of the United States

October Term, 1955

No.

UNITED ELECTRICAL, RADIO and MACHINE WORKERS of AMERICA, JOHN W. NELSON, individually, and as President of UE LOCAL 506, on behalf of himself and all other employees of the General Electric Company similarly situated,

Petitioners,

v.

GENERAL ELECTRIC COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

United Electrical, Radio and Machine Workers of America (UE) and John Nelson pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on March 22, 1956.

The Opinions Below

The opinion of the Court below (Appendix A, *infra*, pp. 1a to 4a) is reported at 231 F. 2d 259. The opinion of the District Court (Appendix B, *infra*, pp. 5a to 20a) is reported at 127 F. Supp. 934.

Jurisdiction

The judgment of the Court of Appeals was entered March 22, 1956. The time within which to petition for a writ of certiorari was extended to July 20, 1956 by order of Mr. Justice Black, dated June 15, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254.

Questions Presented

1. Does the National Labor Relations Act divest courts of jurisdiction over union claims against employers arising from the breach of a collective bargaining contract where the breach of contract is also an unfair labor practice?

2. Is a District Court deprived of jurisdiction which it would otherwise have over a claim for breach of contract, by the fact that it is a union claim that employees have been injured by an employer's breach of a collective bargaining contract?

3. Whether the Senate may foreclose relevant testimony or the production of relevant documents in a proceeding before the Judicial branch of Government merely by the naked assertion of a "privilege" of the Senate, where no question of secrecy of military or international affairs is involved, and where, moreover, the activities inquired into in the Court proceeding are beyond the legitimate scope of activities of the Senate and the Subcommittee.

4. Where District Court jurisdiction is adequately pleaded for at least a part of plaintiff's claim, does the District Court have jurisdiction to settle the whole controversy including that part of plaintiff's claim over which it might not have otherwise had original jurisdiction?

5. In a District Court action for declaratory relief involving the right to a job, is the job right to be valued for

jurisdictional purposes by the face value of the salary and other benefits attached to the job?

6. Where damages from the loss of a job amount on their face to more than $3,000, does the fact that a defense in mitigation of damages may be proved at trial result in the loss of District Court jurisdiction?

7. Whether it is "obvious" cause for discharge that an employee in private industry who has no access to "classified" work properly asserts his privilege against self-incrimination under the Fifth Amendment in response to questions by a Congressional Committee inquiring into his political beliefs and affiliations?

8. Whether an employer violates its contractual duty of full union recognition by the unilateral promulgation of a new term and condition of employment changing previous terms and conditions of employment without previous notice to or negotiations with the union involved?

Constitutional Provisions and Statutes Involved

The Constitutional provision here involved, the Fifth Amendment, provides "No person shall * * * be compelled in any criminal case to be a witness against himself."

Section 10(a) of the National Labor Relations Act (61 Stat. 146, 29 U. S. C. § 160) provides in part as follows:

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. * * *"

Title 28 U. S. C. § 1343 (62 Stat. 932, 68 Stat. 1241) provides:

> "The District Courts shall have original jurisdiction of any civil action authorized to be commenced by any person:
>
> "(1) To recover damages for injury to his person or property or because of any deprivation of any right or privilege of a citizen of the United States by any act done in furtherance of any conspiracy mentioned in Section 1985 of Title 42. * * *"

Section 1985(3), 42 U. S. C. (R. S. 1980) provides in part:

> "If two or more persons in any State or Territory conspire * * * for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; * * * in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the objects of such conspiracy whereby another is injured in his person or property, or deprived of having and exercising any right or privileges of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators."

Statement of the Case

The Events Giving Rise to This Proceeding

On December 9, 1953, the president of the General Electric Company (hereinafter called the Employer) issued a new regulation providing, in relevant part, for a ninety-day suspension followed by discharge of any of its employees who in a public hearing might, in asserting his privilege under the Fifth Amendment, decline to answer questions directed to any past or present Communist

"affiliations" (Complaint, Exhibit B, J. A. 16-21). This rule was made retroactive for six months prior to its date (J. A. 18). Discharge in either case was to be avoided only by appearance before a Congressional Committee (or other Government authority) within the ninety-day period of suspension and fully answering under oath questions pertaining to any Communist affiliations.

Immediately upon learning of this regulation the United Electrical, Radio & Machine Workers of America (UE) (hereinafter called the Union), collective bargaining representative for a number of the Employer's employees at various situations, asked for a meeting with the Employer (J. A. 85). A meeting was held between the Union and the Employer on December 14, 1953. At this meeting the Union stated that the rule established a new condition of employment which had not been negotiated with the Union and was a violation of the collective bargaining agreement between the Employer and the Union (J. A. 86-87, 438). The Union asked that the rule be withdrawn as a violation of the agreement and that the matter be taken up in collective bargaining negotiations between the parties (J. A. 88-90). The Employer refused (J. A. 122).

Two days after the promulgation of the discharge regulation of December 9, 1953, the Employer suspended—without notice—John Nelson, an employee at its Erie works, who had appeared a month previously before the Subcommittee on Internal Security of the Senate Judiciary Committee. At that hearing Nelson—after stating that he had signed five of the non-Communist affidavits required by the Taft-Hartley Act—had exercised his Fifth Amendment privilege against self-accusation with regard to questions relating to Communist "affiliations" or knowledge of Communist activity (Answer, Ex. B, J. A. 28-43; Pl. Ex. 2). Staber, another Erie employee who had appeared before the same Committee and had likewise exercised his constitutional privilege, was suspended the same day. Other

employees at the Schenectady plant of the Employer were suspended in 1954 as a result of their claim of privilege before the Senate Permanent Sub-committee on Investigations of the Committee on Government Operations, headed by Senator McCarthy.

The Union filed grievances protesting the suspensions at Erie and Schenectady and grievance meetings were had between the local unions and local management and then at the national level in New York between the Union and the Employer (J. A. 93, 99). During all these discussions the Employer representatives adamantly refused to consider any facts other than that the employees had asserted their Fifth Amendment rights (J. A. 94, 161-162, 163). Each employee was discharged as his ninety-day suspension expired. As a consequence, they lost valuable rights established by the Union contract (Complaint, Ex. A), including seniority rights, pension rights at age 65, and insurance (J. A. 168-178).

The work done by the Employer for the Government upon contract involving "classified" information had at all times been subject to security regulations established by the Department of Defense (Complaint, Ex. B; J. A. 16-17). None of the employees here had been employed or had access to classified work. There had been no classified work at the Erie plant, where Nelson was employed, since approximately the end of World War II (J. A. 149-150).

Since 1950 the Employer had recommended to Government agencies that such agencies should determine and direct when an employee should be excluded from employment on civilian as well as classified military work. These recommendations were rejected by the Government agencies (J. A. 785).

The Contract Provisions

The contract provisions mainly involved, Articles I and XV, are set out in Appendix C, page —, *infra*. Article I, "Union Recognition", provides for full and unqualified recognition of the union as the collective bargaining agent for the employees it represented. Article XV, "Grievance Procedure", outlines a three level grievance procedure for the handling of individual grievances. Article XV(3), "Procedure for Disciplinary Cases", provides for one week's notice before any penalty may be imposed "except for discharge for obvious cause," and that employees should be reimbursed for loss of wages "in the event it is determined that an employee has been improperly penalized."

The Proceedings Below

The Petitioners here brought suit against the Employer in the District Court for the District of Columbia. The Union charged that the Employer had breached the Recognition, Grievance and Discharge provisions of the union contract (Articles I, XV and XV(3)) by the unilateral promulgation of the discharge regulation, by summarily discharging employees without "obvious cause" solely because of their assertion of the Fifth Amendment privilege, and by adamantly refusing to consider any fact in grievance negotiations on the discharge other than whether or not the employees involved came within the four corners of the regulation.

Nelson sued, both for himself and as representative of other employees affected by the regulation, for declaratory judgment as to his right to his job, damages and injunctive relief. Nelson rested his claim both upon the contract and upon the Civil Rights Acts (42 U. S. C. 1985 (3)), alleging that the regulation was promulgated and the discharges were made as a part of a conspiracy to deprive employees of their rights and that he had been injured thereby.

The jurisdiction of the District Court for the District of Columbia was invoked because the Employer was found in the District of Columbia and under Title 29 U. S. C. § 1343, granting District Courts jurisdiction over cases arising under the Civil Rights Acts.

The District Court Decision

The District Court, sitting without a jury, held for the Employer on the merits. It held that the unilateral promulgation of the discharge regulation was not a denial of full recognition to the union; that discharges based upon the assertion of the Fifth Amendment privilege were discharges for obvious cause; and that there was no legitimate room for discussion, in the grievance negotiations on the individual discharges, of any fact other than whether or not the individual employees had exercised their constitutional rights.

With regard to the conspiracy claim the District Court ruled that the plaintiffs had not proven their case. The rulings of the District Court restricting plaintiff's proof are raised here as error.

The Court of Appeals Decision

The Court of Appeals did not rule upon the merits (except as to the Civil Rights claim where it approved the Trial Court ruling) nor did it pass upon the Trial Court's rulings on evidence. Instead it ordered the case dismissed on jurisdictional grounds. The Court of Appeals held as follows:

1. The District Court had no jurisdiction of the Union's claim for breach of the Recognition and Grievance provisions of the contract. Such a breach was an unfair labor practice and within the exclusive primary jurisdiction of the National Labor Relations Board.

2. The District Court had no jurisdiction over the Union's claim based on breach of the discharge provisions

of the contract. Citing the decision of this Court in *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U. S. 437, the Court of Appeals ruled that a District Court had no jurisdiction under any jurisdictional statute over a union's claim that employees had been injured by an employer's breach of a collective bargaining contract.

3. The District Court had no jurisdiction of Nelson's claim since it did not appear that if he had not been discharged, he would have availed himself of his job right sufficiently to earn more than $3,000. The Court of Appeals held that Nelson could not count the face value of life insurance which he lost by reason of his discharge for jurisdictional purposes since he might continue the policy individually. The Court did not discuss the insurance protection other than life insurance which Nelson received under the contract.

The Rulings at Trial

At the trial, Petitioners sought to prove their claims of conspiracy by showing a conspiracy between the Employer, its officers and agents, and employees and agents of the Senate Permanent Subcommittee on Investigations. As a part of their proof of this conspiracy, Petitioners sought to adduce relevant evidence from George Anastos and Joseph Juliana, employees of the Subcommittee. Mr. Anastos was asked the following question:

> "Q. Mr. Anastos, did you and Mr. Roy Cohn enter into arrangement with Mr. Stevens and Mr. LaForge, representatives of the General Electric Company, on or about late October or early November 1953 at the Mohawk Club in the City of Schenectady to the effect that General Electric employees would suspend and then discharge any such employees who asserted any constitutional right or

> privilege as a reason for declining to answer questions relating to so-called communist associations?" (J. A. 200).[1]

Counsel for the witness objected to the question, resting his objection upon a special resolution of the Senate which had been passed by that body subsequent to the service of the subpoena and prior to the appearance of the witness (Senate Resolution 329, Court Ex. 1, J. A. 763). The Resolution recited the Senate's general willingness when testimony of its employees was held "needful" in court "to take such order thereon as will promote the ends of justice consistently with the rights and privileges of the Senate." After reciting the facts of the subpoena, the Resolution then directed that the witness Anastos should:

> "Decline to testify on any other matters including, but not limited to, the investigation or, the disciplining retention or discharge of, any employee or employees of the General Electric Corporation or the agents or representatives of said employee or employees, or any knowledge concerning same, all of which were acquired by said C. George Anastos in his official position, as such testimony is within the privileges of the Senate of the United States; * * *" (J. A. 766).

Counsel for Petitioners asked that the witness be directed to answer and the matter be returned to the Senate for further consideration (J. A. 215). The Trial Court upheld the objection to the question, basing its ruling solely on the Senate Resolution (J. A. 221).

---

[1] For the purpose of making his record, the Trial Court permitted counsel for the plaintiffs to propound certain additional questions to the witness, all of which were related to the alleged arrangements arrived at between the witness and other employees of the Senate Committee and representatives of the defendant company. To each of these questions counsel for the witness asserted the "senatorial privilege," and the Trial Court upheld the assertion consistently (J. A. 222-227).

The Trial Court made a similar ruling based upon a similar Senate Resolution (J. A. 768), in refusing to direct the production of the documents called for in a subpoena duces tecum served on the witness Juliana [2] (J. A. 232-233, 236).

---

[2] The subpoena duces tecum called for the production of the following documents:

> "(1) All memoranda or copies thereof in the possession of the Special Subcommittee on Investigations of the Senate Committee on Government Operations of any meetings, conferences or discussions had from October 1, 1953, to September 1, 1954, inclusive, between Roy Cohn, George C. Anastos, Francis Carr or any member or other representative or agent of said subcommittee with any officer, representative or agent of the General Electric Company, with respect to the investigation and discipline or discharge of any employee or employees of the General Electric Company for asserting any rights, privileges or immunities of the United States Constitution in declining to answer questions of a congressional investigating committee.
>
> "(2) All written communications or copies thereof in the possession of said subcommittee written from October 1, 1953 to September 1, 1954, inclusive, between Senator Joseph R. McCarthy, Roy Cohn, George C. Anastos, Francis Carr, or any other representative or agent of said subcommittee and any officer, representative or agent of the General Electric Company with respect to the investigation, discipline or discharge of any employee or employees of the General Electric Company for asserting any rights, privileges or immunities of the United States Constitution to answer questions of a Congressional Investigating Committee.
>
> "(3) Stenographic transcripts of hearings conducted by said subcommittee on November 12 and 13, 1953, in Albany, New York" (Pl. Ex. 15).

Reasons for Granting the Writ

The Primary Jurisdiction Question

1. The decision below vesting in the Board exclusive primary jurisdiction over acts which may involve both breaches of contract and unfair labor practices raises an important question of Federal law which has not been, but ought to be, settled by this Court. Moreover, it conflicts with the decision of the Courts of Appeals for the Sixth Circuit, the Third Circuit, the Supreme Judicial Court of Massachusetts, and with holdings by the Board itself.

In *N. L. R. B.* v. *Standard Oil Co.* (C. A. 6, 1950), 196 F. 2d 892, the Court upheld the employer's defense, to an unfair labor practice charge (based upon unilateral change in existing working conditions), that the union involved had not availed itself of its legal remedies under the contract. The two Courts of Appeals thus prescribe mutually exclusive procedures for a case where a breach of contract is also an unfair labor practice.

In *Independent Petroleum Workers of New Jersey* v. *Esso Standard Oil Co.* (C. A. 3, June 26, 1956), — F. 2d —, 38 LRRM 2307, the Court of Appeals held that it had jurisdiction over a union claim for breach of contract based upon an employer refusal to bargain collectively. The Court of Appeals overruled the holding of the District Court that "the dispute and the parties thereto are subject to the exclusive jurisdiction of the National Labor Relations Board.

In *Post Publishing Co.* v. *Cort* (May 29, 1956), — Mass. —, —, NE 2d —, 38 LRRM 2198, 2201, the Supreme Judicial Court refused to stay a contract arbitration [3] founded on a claim of discriminatory discharge. The Court said:

---

[3] For the purposes of the question here there is no distinction between arbitration and judicial trial. An arbitration is merely another form of judicial trial. The Employer did not demand arbitration here, although it might have under Article XXV of the contract.

"The further contention of an unfair labor practice, here union activities, should not preclude resort, at least in the first instance, to the procedure voluntarily adopted by the parties in their formal agreement. Decisions of the Supreme Court of the United States have not yet passed upon the jurisdiction of an arbitrator to adjudicate a contract violation which is also an unfair labor practice. 69 Harv. L. Rev. 726. See *Garner* v. *Teamsters, Chauffeurs & Helpers Union Local Union No. 776 (A. F. L.)*, 346 U. S. 485; *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U. S. 656; *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468. And in the absence of a clear expression of congressional intent, we shall not assume a lead in rendering largely useless a common method of expediting settlement of a labor controversy and a method which is approved in congressional declaration of policy. See § 101, 203 (d), of the labor management relations act of 1947, commonly called the Taft-Hartley act; 61 U. S. Sts. at Large, 136, 154; U. S. C. (1946 ed.) Sup. V., Title 29, § 151, 173 (d). We recognize that, as a practical matter, the National Labor Relations Board cannot undertake to determine everything which is sought to be brought before it, and declines to review many cases. 69 Harv. L. Rev. 725, 729 et seq. We cannot believe that Congress intended to create a no man's land where voluntary arbitration is barred and the National Labor Relations Board may be too overburdened to enter. There must be a penumbral zone where an initial tribunal selected by the parties may be permitted to reduce controversies in both number and scope prior to resort to an administrative or judicial tribunal."

The Board itself has rejected the exclusive primary jurisdiction over breach of contract which the decision below would thrust upon it. In *United Telephone Co.*, 112 N. L. R. B. 779, the union charged an unfair labor practice in the employer's unilateral change of contract conditions. The Board dismissed the charge, holding:

"In view of its contractual relations with the Respondents the Union's recourse in this situation was

> to exhaust the possibility of settling the overtime question by negotiation and failing such settlement to seek judicial enforcement of its construction of the contract. The Board is not a proper forum for parties seeking to remedy an alleged breach of contract or to obtain enforcement of its terms."

See also:

> *McDonnell Aircraft Corp.*, 109 N. L. R. B. 930; *Spielberg Mfg. Co.*, 112 N. L. R. B. 1080.

2. As the Board rulings show, the traditional legal remedies for breach of contract should be regarded as "complementary to, rather than in conflict with, the power of the N. L. R. B. to remedy unfair labor practices." Note: 69 Harvard L. Rev. 725, 727. The Report of the House Conferees on the 1947 Amendments demonstrates that such was the congressional intent:

> "Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." [4]

The House Report reflects the basic philosophy of the Act. The signing of a collective bargaining agreement is an objective of the Act as the final step in the bargaining process. *H. J. Heinz Co.* v. *N. L. R. B.*, 311 U. S. 514. It was the Congressional intent that, once the contract was made, it should be binding on both parties and enforceable according to law. So long as the contract is not contrary to the policies of the Act, it provides the measure governing the parties' relationships. *N. L. R. B.* v. *Sands Mfg. Co.*, 300 U. S. 332; *Timken Roller Bearing Co.* v. *N. L. R. B.* (C. A. 6, 1947), 161 F. 2d 949, 955-956.

---

[4] House Conference Report No. 510, p. 42 (80th Cong., 1st Sess.).

The congressional rationale applies most strongly to contract areas which are also included within the scope of the Act, the recognition and no-discrimination clauses of collective agreements. It is these clauses which most urgently require the protection which the traditional legal remedies for breach of contract afford and which the decision below denies. For, it is the main purpose of the collective bargaining agreement to provide "a code for the government of an industrial enterprise." *Campbell* v. *I. A. M.*, 337 U. S. 521, "a framework within which the process of collective bargaining may be carried on" *N. L. R. B.* v. *Highland Park Mfg. Co.* (C. A. 4, 1940), 110 F. 2d 632. The union recognition and no discrimination clauses are therefore the very foundation stone of a labor contract.[5] If they are not enforceable, the whole contract may well be meaningless.

3. The rationale of *Garner* v. *Teamster's Union*, 346 U. S. 485, does not apply here. In *Garner* the grant or denial of the state court remedy, an injunction against picketing, would either have destroyed a right protected by Section 7 of the Act or have permitted conduct forbidden by Section 8(b)(4) of the Act. Conflict of remedies was in-

---

[5] "While union protective clauses are not so important to the unions as they were before the passage of the National Labor Relations Act, the historical opposition to unions on the part of a large segment of employers has made union protective clauses a traditional must in collective bargaining negotiations." Hill and Hook: *Management at the Bargaining Table*, pp. 11-12 (McGraw-Hill Book Co. 1945).

"An important section of union agreements is that which outlines the basic relations between the union and the employer: The degree of recognition extended, the method of hiring new employees, the union membership status of regular and newly hired employees, dues collection, the use of the union label, and similar matters." *Union Agreement Provisions*, p. 19 (U. S. Dept. Lab. Bureau of Labor Statistics Bulletin No. 686).

See also *3 Collective Bargaining Negotiations and Contracts* 70:61 (Bureau of National Affairs).

evitable. The Court properly held that the decision in such a case had been given to the Board.

In the case here, however, no such inevitable conflict of remedies is present. Petitioner Union does not seek an injunction, the Board's remedy under the Act. It merely seeks the established legal remedy of declaratory judgment cf. *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U. S. 656. The grant or denial of this relief will not inevitably duplicate the jurisdiction of the Board. The Employer asserts no protected Federal right, analogous to the right to picket in the *Garner* case, which might be destroyed by an incorrect decision. And the Board at all times retains the authority to institute an unfair labor practice proceeding.

The mere possibility of disagreement between the Board and a State or Federal Court is not the determinative factor in deciding the jurisdictional question. *International Longshoreman's and Warehouseman's Union* v. *Juneau Spruce Corp.*, 342 U. S. 237. *United Brick and Clay Workers* v. *Deena Artware, Inc.* (C. A. 6, 1952), 198 F. 2d 637, cf. *N. L. R. B.* v. *Deena Artware, Inc.* (C. A. 6, 1952), 198 F. 2d 645; *N. L. R. B.* v. *Pacific Intermountain Express Co.* (C. A. 8, 1955), 228 F. 2d 170. Such a possibility exists in every action on a union contract. "[F]ederal law is, in certain respects, in the background of any action on a collective bargaining agreement affecting commerce * * *" *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corporation*, 348 U. S. 437, 451. It is well established that an employer's own breach of contract can be a defense in a court proceeding to its action for breach of contract even though the employer's breach of contract be also an unfair labor practice. *Boeing Airplane Co.* v. *Aeronautical Industrial District* (D. C. Wash., 1950), 91 F. Supp. 596, 608, aff'd 188 Fed. 356, cert. den. 342 U. S. 821, cf. *Mastro Plastics Corp.* v. *N. L. R. B.*, 350 U. S. 270.

Likewise inapposite is this Court's ruling (relied upon below) in *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 307 U. S. 261, 264, that only the Board might prevent unfair labor practices. That statement has reference only to the protection of rights created by the Act. It does not apply to rights which arise out of contract and over which the Board has no jurisdiction.

4. The decision below threatens serious harm to industrial stability, the fundamental purpose served by the Act. Under the common scheme of labor contracts the employer pledges itself contractually to perform a number of duties which are also laid upon it by the Act (union recognition, no discrimination, no lock-out, sixty-day notice of contract termination, etc.). These promises are conditions concurrent to the no-strike promise of the union. *Boeing Airplane Co.* v. *I. A. M., supra; Mastro Plastics Corp.* v. *N. L. R. B., supra; Kingston Trap Rock Co.* v. *International Union of Operating Engineers*, 129 N. J. Eq. 570, 19 A. 2d 661. *Winter* v. *Lefkowitz* (Sup. Ct. Kings Cty., 1938), 6 N. Y. Supp. 2d 184 (not officially reported). The decision below, by destroying the promise for which the no-strike pledge is exchanged, destroys the foundation of that pledge and releases the unions from their no-strike obligation, a strange result under an Act which explicitly proclaims as its purpose the avoidance of industrial strife.

The Misinterpretation of *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*

5. The Court below misread this Court's decision in *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp. supra*, as depriving District Courts of jurisdiction over all union contract claims involving employee's rights. It therefore ruled out the Union claim based upon the discharge provisions of the contract. This is plainly incorrect. The *Westinghouse* case merely holds that § 301 of the Taft-Hartley Act does not confer any new jurisdic-

tion over union claims for breach of contract. It does not destroy such jurisdiction otherwise existing by reason of diversity of citizenship or the District of Columbia Code. The misinterpretation of the Court below should be promptly corrected lest it work further mischief in labor-management relations and narrow still further the limited remedies of unions seeking to enforce their contracts. See Wyle: *Unions in Search of a Forum to Enforce Contracts*, 7 Lab. L. J. 425.

The opinions in the *Westinghouse* case make it clear that this Court felt that, under customary jurisdictional standards, a union was a logical and proper party to seek enforcement of its contract. Mr. Justice Frankfurter, speaking for himself and Justices Burton and Minton, pointed out that any other policy would defeat the natural expectations of the parties and result in aggravation rather than mitigation of industrial warfare (348 U. S. at pp. 456-458). And Mr. Justice Douglas (Mr. Justice Black concurring) stated:

> "What the union obtains in the collective agreement it should be entitled to enforce or defend in the forums which have been provided. When we disallow that standing, we fail to keep the law abreast of the industrial developments of this age" (348 U. S. at p. 467).

The decision below is also in conflict with the decisions of other Courts of Appeals prior to the *Westinghouse* case, which have upheld the rights of unions to enforce their contracts in the Federal forum. *System Federation No. 59* v. *Louisiana & A. Ry. Co.* (C. A. 5, 1941), 119 F. 2d 509, cert. den. 314 U. S. 656. See also *Milk Wagon Drivers' Union* v. *Associated Milk Dealers Inc.* (D. C. Ill.), 42 F. Supp. 584. Cf. *MacKay* v. *Loew's Inc.* (C. A. 9, 1950), 182 F. 2d 170, 172, cert. den. 330 U. S. 828.

The Union's claim for breach of the discharge clause clearly met the jurisdictional requirements of the District

of Columbia Code if the interpretation given the *Westinghouse* case below be disregarded. The Union loss of the promised performance is not capable of monetary valuation and the District Court is not deprived of jurisdiction by the financial limitation of par. 11-755 of the District of Columbia Code. *Klepinger* v. *Rhodes* (C. A. D. C. 1944), 78 App. D. C. 340, 140 F. 2d 697. *Eigen* v. *Lamson* (C. A. D. C. 1949), — App. D. C. —, 179 F. 2d 56. Moreover, the discharge of the eight employees whom the record shows have already been discharged as a result of the Employer's breach involves many thousands of dollars in wages and valuable rights which each have lost under the contract (J. A. 177-178).

The Senate "Privilege"

6. The ruling of the Trial Court, sustaining objections to highly relevant evidence upon the naked assertion of an alleged "privilege" of the Senate, abdicated its Constitutional judicial function of examining the facts and deciding for itself the validity of the privilege asserted. In *Kilbourne* v. *Thompson*, 103 U. S. 168, 186, this Court described the Court's duty as follows:

> "[W]hen the rights of the citizen are at stake in a court of justice, it must, if these [Congresssional] privileges are set up to his prejudice, examine for itself into the nature and character of those laws, and decide upon their extent and effect upon the rights of the parties before the court."

The Trial Court rulings encourage encroachments upon the rights of citizens which would be immune to judicial inquiry. As Professor Wigmore points out:

> "The truth cannot be escaped that a court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to bureaucratic officials too ample opportunities for abusing the privilege. The lawful

> limits of the privilege are extensible beyond any control if its applicability is left to the determination of the very officials whose interest it may be to shield a wrong-doing under the privileges. Both principle and policy demand that the determination of the privilege shall be for the court; and this has been insisted upon by the highest judicial personages both in England and in the United States" (8 Wigmore, Sec. 2379, p. 799).

The rulings strike deeply at the Petitioners' right to their day in court and a full and fair hearing. They limited Petitioner Nelson's proof of his case to the testimony of witnesses who were employees of the Defendant. Especially in a case of this nature, involving a possible violation of the Civil Rights Acts, Nelson should have been given full opportunity to prove his case by the testimony of other persons involved in the situation and from public documents.

The very concept of a general Congressional "privilege" of secrecy whose validity a court may not question is contrary to our constitutional system. Moreover, even if such a Congressional privilege existed, the questions asked and documents sought at the trial could not be within it. An answer—whether "yes" or "no"—to the question posed the witness Anastos[5a] could not have revealed any activity within the Legislative power. An arrangement with a private employer to accomplish the discharge of any employee who might assert a Constitutional privilege lies without the legislative powers of Con-

---

[5a] "Q. Mr. Anastos, did you and Mr. Roy Cohn enter into arrangement with Mr. Stevens and Mr. LaForge, representatives of the General Electric Company, on or about late October or early November 1953 at the Mohawk Club in the City of Schenectady to the effect that General Electric employees would suspend and then discharge any such employees who asserted any constitutional right or privilege as a reason for declining to answer questions relating to so-called communist associations?" (J. A. 200).

gress and beyond the jurisdiction of the Committee.[6] Only recently, in *Quinn* v. *U. S.*, 349 U. S. 155, this Court has reaffirmed the traditional doctrine that the implied powers of Congress are limited by its express legislative powers. If the employees of the Senate Committee were in fact engaged in the activities suggested by the questions asked, then they were acting beyond their powers and no Congressional "privilege" extended to the information sought.

7. Historically, Congress itself has not claimed such an absolute privilege as the Trial Court recognized, and the Senate did not assert such an absolute privilege here. All that the Senate Resolution did was to interpose a preliminary objection that private parties should not be permitted access to the testimony and documents prior to the Court's determination that the material sought was "needful." The Trial Court's refusal to make such a ruling was in error.

6 Cannon's Precedents, p. 826, Par. 587, reports general Congressional practice as follows:

> "Permission to remove from their place of file or custody any documents or papers was denied by the House, but the court was afforded facilities for making certified copies. This seems to have been the

---

[6] The Committee is given jurisdiction as follows: (Legislative Reorganization Act of 1946, Sec. 102(g), 60 Stat. 816)

"(2) Such committee shall have the duty of—

"(A) receiving and examining reports of the Comptroller General of the United States and of submitting such recommendations to the Senate as it deems necessary or desirable in connection with the subject matter of such reports;

"(B) studying the operation of Government activities at all levels with a view to determining its economy and efficiency;

"(C) evaluating the effects of laws enacted to reorganize the legislative and executive branches of the Government;

"(D) studying intergovernmental relationships between the United States and the States and municipalities, and between the United States and international organizations of which the United States is a member."

> uniform practice in respect to subpoenaes duces tecum issued by a court upon the clerk of the House to produce in court original papers from the files of the House."

The Senate Resolution here evidences no intention to depart from precedent. S. Res. 329 [7] provides in part:

> "RESOLVED, That when it appears by the order of the court or of the judge thereof, or of any legal officer charged with the administration of the orders of such court or judge, that testimony of an employee of the Senate of the United States is needful for use in any court of justice or before any judge or such legal officer for the promotion of justice and, further, such testimony may involve documents, communications, conversations, and matters related thereto under the control of or in the possession of the Senate of the United States, the Senate of the United States will take such order thereon as will promote the ends of justice consistently with the privileges and rights of the Senate" (J. A. 765-766).

At most, therefore, the Senate Resolutions could be interpreted as requesting a ruling upon the need for the evidence sought so that the Senate might have the Court's view before finally deciding whether to assert a privilege. The refusal of the Trial Court to make such a ruling was an abdication of its function. It deprived Petitioner of his right to a full and fair trial.

Proof of a conspiracy to violate civil rights is at best difficult by the very nature of such conspiracies. The Attorney General has only recently recognized the need for strengthening, rather than weakening, existing laws in this area. (*New York Times*, April 10, 1956, pp. 1, 20). The rulings below throw an additional block in the way of the enforcement of the laws when it is common knowledge that

---

[7] S. Res. 330 has similar language (J. A. 768).

conspiracies against Civil Rights are becoming more widespread than at any time since the passage of the Civil Rights Acts.

District Court Jurisdiction to Settle the Whole Controversy

8. The ruling below ignores the established rule that once District Court jurisdiction attaches the Trial Court has power to settle the whole controversy, whether the particular claim upon which jurisdiction rests be ultimately upheld, denied, or by-passed. *Siler* v. *Louisville & Nashville R. R. Co.*, 213 U. S. 175; *Hurn* v. *Oursler*, 289 U. S. 238; *Hillsborough Township, Somerset County* v. *Cromwell*, 326 U. S. 620. Unquestionably, the District Court had jurisdiction here of Nelson's claim based upon the Civil Rights Act since there is no monetary limitation upon jurisdiction over such a claim. *Hague* v. *C. I. O.*, 307 U. S. 496. Once the District Court was siesed of the case it could, as it did, dispose of it entirely. The Court below erred in remanding the case for dismissal without full consideration of the merits of Nelson's claim.

In the context of a claim under the Civil Rights Act this question expands beyond the level of a technical, if important, problem of Federal jurisdiction. Claims for redress under the Civil Rights Acts customarily also involve claims resting upon state law. The persons whom the Civil Rights Acts is designed to protect are often impoverished and unable to undertake extensive litigations.[8] Their complaint that they have been wronged may often be a just one and involve transgressions within the spirit of the Civil Rights Acts, even if the case at trial does not meet every technical stringency of those Acts. The rulings below would remit

[8] The Attorney General has seemed to recognize this problem in proposing legislation which would authorize the Attorney General to initiate civil action to protect the rights envisaged by 42 U. S. C., Section 1985 (N. Y. Times, April 10, 1956, pp. 1, 20).

such plaintiffs to another lengthy and expensive litigation before a local court perhaps less than sympathetic to claims involving civil rights.

The Value of Nelson's Job Right

9. The decision below conflicts with applicable decisions of this Court, and of other Courts of Appeals as to the standard for valuation of Nelson's job right. Had Nelson not been discharged he would have been entitled to earn more than $3,000 as an employee of the company before the end of the contract. Under the holdings of this Court and other Courts of Appeals that sum is the proper measure of valuation of Nelson's action for a declaratory judgment as to his right in his job.

In *Smith* v. *Whitney*, 116 U. S. 167, 173, this Court held that the jurisdictional requirements were met where a job right was involved "if the salary during the term of office would exceed the sum named in the statute defining jurisdiction." In *Nord* v. *Griffin* (C. A. 7, 1936) 86 F. 2d 481, the Court of Appeals likewise held that a job right should be valued in terms of the right which the employee lost. Even where a fixed term of employment was not involved a Court of Appeals has valued the job right in terms of the "probability" of possible income from the job. *Marshall* v. *Crotty* (C. A. 1, 1950) 185 F. 2d 622. Cf. *Carroll* v. *Somervell* (C. A. 2, 1949) 116 F. 2d 918.

Moreover, the Court below ignored the value of the insurance benefits (other than life insurance) lost by Nelson as a consequence of his discharge, benefits which on their face totalled more than $5,476.00.[9] The face value of insurance policies is the proper measure of the amount in con-

[9] These included a $2,000.00 accidental death policy; $1,001.00 in weekly sickness and accident benefits; $700.00 hospital expense insurance; $1,700.00 for special hospital services, and $175.00 for surgical operations (J. A. 15; Complaint Exhibit A at p. 63).

troversy where the right to the continuance of the policies is in question. *1 Moore's Federal Practice* (1st Ed., 1948) 527-528, *Bell* v. *Phila. Life Insurance Co.* (C. A. 4, 1935) 78 F. 2d 322.

The Court below seems to have confused the declaratory judgment and damage remedies. As the cases cited above show, where a remedy other than damages is sought, the value of the right is determinative. Even as far as the damage claim is concerned, however, the District Court would not be deprived of jurisdiction by the existence of a defense in mitigation of damages. In *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283, 289, this Court held:

> "The inability of plaintiff to recover an amount adequate to give the court jurisdiction does not show his bad faith or oust the jurisdiction. Nor does the fact that the complaint shows the existence of a valid defense to the claim."

The problem here presented—the evaluation of a job right for purposes of District Court jurisdiction—is an important one. The widespread nature of collective bargaining agreements guarantees that plaintiffs seeking redress for the loss of their jobs will apply to the Federal courts either on diversity or other grounds. The decision below raises serious questions concerning the extent of this jurisdiction. This Court should resolve those questions in accordance with its previous decisions.

The Fifth Amendment Privilege

10. The failure of the Court below to reverse the finding of the District Court, that the discharges based solely upon the assertion of the Fifth Amendment privilege were discharges for "obvious cause," raises an important question of law and conflicts in principle with decisions of this Court. This Court has only recently held in *Slochower* v. *Board of Higher Education*, 350 U. S. 551, that the asser-

tion of the Fifth Amendment privilege does not provide a "reasonable basis" for a State to discharge its employees. *A fortiori,* a discharge based on an assertion of the privilege cannot meet the even more rigorous requirement of the contract here, that there be "obvious cause" for discharge.

"Cause" has long been recognized in the field of industrial relations as a concept providing an objective substantive standard governing the imposition of discipline, incorporating the standards of propriety governing the community.[10] The holdings are nearly unanimous that where, as here, a right of appeal from discharge is given an employee, coupled with provision for reinstatement and back pay in the event the discharge be held improper, an objective standard of "cause" governing discharges is incor-

---

[10] Before the First World War, in a decision as Impartial Chairman establishing a "just cause" for discharge standard under the clothing industry protocol, the late Justice Brandeis concluded:

> "We believe that any attempt to define what is fair and reasonable with reference to discharge or in the administration of the shop would in the long run, lead rather to injustices than to justice. What is fair and reasonable all things considered is something which in the absence of specific agreement between the parties must be left to the judgment of men familiar with the particular facts and the facts will vary in particular cases.
>
> "We are confronted with a situation which is similar to that with which courts and juries have constantly to deal * * * what is reasonable care, * * * what is reasonable notice, and * * * what is reasonable cause for action. Any attempt to codify what is reasonable would have to make provision and take into consideration so many possible conditions and such remote possibilities that the mind of man could not possibly determine in advance the rule to be applied. Indeed, the rules, if determined in advance, would prove so numerous that the mere selection of the rule to be applied would present a difficulty almost insurmountable." Cohen, *Law & Order in Industry,* 266 (1916). (Cited in *Case Law or Free Decision in Grievance Arbitration,* 62 Harv. L. Rev. 118, 122.)

porated into the contract.[11] The addition of "obvious" merely enhances the operative effect of that concept. The justice of the cause must be readily plain and apparent to reasonable men.

The Trial Court failed to apply the clear standards of propriety which this Court has squarely established in *Quinn* v. *U. S.*, 349 U. S. 155 and *Emspak* v. *U. S.*, 349 U. S. 190, for judging the assertion of the Fifth Amendment privilege. The Fifth Amendment privilege is a "great right" associated since its inception with protection against inquisition into heresy. No moral turpitude it attached to its exercise. The privilege is not to be applied "grudgingly," but is to be given the full recognition which its place in the Bill of Rights demands. Indeed, it is precisely at times such as these "when the privilege is under attack by those who wrongfully conceive of it merely as a shield for the guilty—that governmental bodies must be most scrupulous in protecting its exercise."

To maintain, as did the Trial Court (App. B, *infra*, p. 14a), that the discharges were based upon the "effects" of the assertion rather than on the assertion of the privilege itself merely evades this Court's rulings in *Quinn*, *Emspak* and *Schlochower*.[12] The assertion of the privi-

---

[11] *Illinois Central R.* v. *Moore* (C. A. 5, 1940), 112 F. 2d 959; *Steadman* v. *Atlantic Coast Line R. Co.* (C. A. 4, 1943), 138 F 2d 691; *Koppal* v. *Transcontinental and Western Air Lines* (C. A. 8, 1952), 199 F. 2d 117, 119; *Olsen* v. *Arabian American Oil Co.* (C. A. 2, 1952), 194 F. 2d 477, 478; *Beeler* v. *Chicago R. I. & P. Ry. Co.* (C. A. 10, 1948), 169 F. 2d 557; *Union Pac. Ry. Co.* v. *Olive* (C. A. 9, 1946), 156 F. 2d 737; *Farris* v. *Alaska Airlines* (D. C. Wash., 1953), 113 F. Supp. 907; *Johnson* v. *American Ry. Express Co.*, 163 S. C. 191, 199, 178 S. E. 671; *Marshall* v. *Charleston & W. C. Ry. Co.*, 164 S. C. 283, 162 S. E. 348; *Coyle* v. *Erie R. Co.*, 142 N. J. Eq. 306, 59 A. 2d 817; *Earle* v. *Illinois Central R. Co.*, 25 Tenn. App. 673, 167 S. W. 2d 15, 29.

[12] As we show later, no "effects" existed which justified the discharges here in question.

lege is always surrounded by "effects." That is precisely its point. Punishment based upon the circumstances allegedly arising from the assertion of the privilege is as sure a destruction of the privilege as action openly based upon the privilege itself.

It is thus no answer for the Employer to assert that it might have lost money had it not discharged the employees here. The Employer had bound itself by the contract not to discharge its employees improperly. When it made that agreement, the Employer surrendered whatever common law right it may have had to act arbitrarily on its own unilateral decision and on the basis of purely financial motives and fears. At that time, it agreed to be governed by the considerations of fairness and justice which govern our society, including the protection which those standards give to the Fifth Amendment privilege. If the Employer is determined nonetheless to breach the contract, then it must be prepared to face the remedies in damages which the law gives to one injured by a breach of contract, a case for which Article XV(3) specifically provides.

The magnitude of the problem extends even beyond the many thousands of General Electric employees whom the Employer would deprive of the privilege which the Constitution guarantees to all. As the statement of Mr. Roy Cohn shows (J. A. 243), most big employers have adopted a policy of discharging employees who assert their privilege as to their political associations. For millions of workers the exercise of their constitutional right has become an act of economic self destruction. The "blacklist" of the heterodox is fast becoming an institutionalized part of our economic society. Cogley: *Report on Blacklisting*, Fund for the Republic (1956). The impact of the new "blacklist" upon the universal union contract prohibition of discharges, except for "cause," is manifestly of high importance in our country.

11. The magnitude of the Trial Court's departure from the rulings of this Court is shown by the ruling that the assertion of the privilege was such an obvious cause for discharge that no other circumstance need be considered in grievance negotiations (App. B, p. 16a, *infra*). It is undisputed that Article XV(3) requires that each case of discipline be considered on its individual merits. Only if we take the view of the Trial Court, can the Employer's adamant refusal to consider any fact beyond the claim of privilege be considered more than a sham performance of its contract. Cf. *Schlochower* v. *Board of Higher Education.*

But, in truth, there was obvious room for grievance discussions in the very grounds upon which the Employer relied to sustain its policy: military security, employee morale, and loss of profits. None of those grounds applied to the employees here.

None of the employees were employed on, or had access to, classified military production. (There had been none in the Erie, Pa., plant where Nelson worked since the end of World War II.) Nelson himself had signed the Taft-Hartley non-communist affidavits five times. The Defense Department does not require screening of employees on non-classified work. Department of Defense, Industrial Personnel Security Review Regulations, February 2, 1955; Government Security and Loyalty Manual (B. N. A.) 25:151.

Equally inapplicable is the Employer's argument that employee morale was impaired by the assertion of the privilege. As the Trial Court recognized (App. B, *infra*, p. 14a), the only evidence of employee dissension was in a plant where none of the employees here involved worked, and involved none of these employees. Nelson, was retained as President of his local after his appearance before the Committee (J. A. 356). Clearly, the morale of the employees

in Nelson's plant was not affected by his claim of privilege (although it may well have been impaired by the arbitrary discharge of their President).

At the trial the Employer could not point to a single sale lost as a result of any of these employees claiming their privilege even though a month had elapsed between Nelson's claim of privilege and his discharge. (The Employer did produce evidence of an "expert" witness, Harris, which purported to show that the Employer had received unfavorable publicity from attacks made against it by Senator McCarthy (J. A. 493-520). This evidence had no relevance either to the adoption of the policy or the individual discharges. The Employer had solidified its projected new policy by the latter half of November, 1953 (J. A. 392). The first of Mr. Harris' reports was not made until December, 1953 (Def. Exs. 21-25). Moreover, no analysis appears to have been made of favorable or unfavorable newspaper reaction to the assertion of their privilege by the employees here, or to the discharge regulation and the discharges thereunder.)

We have argued above that we do not think that, in any event, the assertion of the privilege can, by itself, constitute "obvious cause" for discharge. Certain it is that its assertion is not "obvious cause" for discharge in every case. Each of the discharges here had its own circumstances and, under the contract, the Employer was obligated to discuss each of the discharges in terms of those circumstances. It is the essence of individual grievances that each case must turn on its own "particular facts and the facts will vary in particular cases." [13] As the record shows, the considerations upon which the Employer relied to support the discharge varied (to say the least) in strength and applicability from case to case. The Em-

[13] Mr. Justice Brandeis, op. Cit., fn. 10, *supra*.

ployer, by refusing to consider any of these cases upon their individual merits and being willing to discuss only whether or not the employees involved came within the four corners of its new regulation, breached its obligations under the contract.

The Employer's Breach of the Recognition Clause

12. The Court below erred in failing to reverse the finding of the Trial Court that the Employer had not breached the Union Recognition clause of the contract by the promulgation. The Union Recognition clause clearly requires that the Employer accord full, good faith recognition to the union. *Boeing Airplane Co.* v. *Aeronautical Industrial District, supra.* As numerous decisions of this Court and other courts demonstrate, the unilateral employer action on a subject of bargaining and the Employer's refusal to consider the individual discharges on their merits are a breach of its contractual obligations.

The record is clear that the Employer instituted its discharge regulation without even giving prior notice to the union, much less consulting with it (App. B, p. 8a, *infra*). Such unilateral action is a denial of good faith recognition. *H. J. Heinz Co.* v. *N. L. R. B.*, 311 U. S. 514; *Mays Department Store* v. *N. L. R. B.*, 326 U. S. 376; *N. L. R. B.* v. *Crompton Highland Mill*, 337 U. S. 217; *Inland Steel Co.* v. *N. L. R. B.* (C. A. 7, 1948), 170 F. 2d 247, cert. den. 336 U. S. 960. Indeed, it is the very negation of true union recognition and merely another form of minority bargaining. *Houde Engineering Corp.*, 1 N. L. R. B. (old), 35 (1934). Only the revocation of the discharge regulation, as requested by the union, could have made good faith compliance with the recognition clause a reality. *General Motors Co.*, 81 N. L. R. B. 779, enf'd (C. A. 2, 1950), 179 F. 2d 221.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

Basil R. Pollitt,
11 East 51st Street,
New York 22, N. Y.,

Frank Donner,
Arthur Kinoy,
Marshall Perlin,
342 Madison Avenue,
New York 17, N. Y.,
Counsel for Petitioners.

Dated: July 18, 1956.

APPENDIX A

Opinion of United States Court of Appeals, District of Columbia Circuit

UNITED STATES COURT OF APPEALS,

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

—o—

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, JOHN W. NELSON, individually, and as President of UE Local 506, on behalf of himself and all other employees of the General Electric Company similarly situated,

v.

GENERAL ELECTRIC COMPANY.

—o—

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Decided March 22, 1956

Before EDGERTON, Chief Judge, and WASHINGTON and DANAHER, Circuit Judges.

EDGERTON, Chief Judge: Appellant Union, certified representative of a number of General Electric Company employees, and appellant Nelson, a member of the Union, ask declaratory and injunctive relief and damages against appellee General Electric Company. The complaint says the Company violated a collective bargaining contract by adopting and enforcing a rule or "policy" that calls for suspension and discharge of employees who invoke the

Fifth Amendment or refuse to testify, before a Congressional committee investigating Communism. Adoption of this rule is said to be a unilateral change in conditions of employment, in violation of the Company's duty to bargain with the Union. Appellant Nelson was suspended, and later discharged, under the rule.

To say the Company violated its duty to bargain with the Union is to say it committed an unfair labor practice. 61 Stat. 141, 29 U. S. C. Section 158(a)(5). The claim is therefore within the exclusive primary jurisdiction of the National Labor Relations Board. "Congress declares that certain labor practices should be unfair, but it prescribed a particular method by which such practices should be ascertained and prevented. By the express terms of the Act, the Board was made the exclusive agency for that purpose." *Amalgamated Workers* v. *Edison Co.*, 309 U. S. 261, 264. The Labor Management Relations Act of 1947 has not given the courts jurisdiction of unfair labor practice claims. The Board's primary jurisdiction of such claims is still exclusive. *Garner* v. *Teamsters' Union*, 346 U. S. 485.[1]

---

[1] The circumstance that the facts alleged in the present complaint, constituting an unfair labor practice, are in the nature of a breach of contract and not, like the facts in the *Garner* case, in the nature of a tort, would not authorize the District Court or this court to create an exception to the *Garner* rule and assert jurisdiction before the Board has been asked to exercise it.

Cf. *Anson* v. *Hiram Walker & Sons*, 222 F. 2d 100, 105 (7th Cir. 1955), cert. denied, 350 U. S. 840 (1955); *United Packinghouse Workers* v. *Wilson & Co.*, 80 F. Supp. 563 (N. D. Ill. 1948); and *United Electrical Workers* v. *Worthington Corp.*, 136 F. Supp. 31 (D. Mass. 1955); also *Textile Workers Union of America* v. *Arista Mills Co.*, 193 F. 2d 529, 533-34 (4th Cir. 1951) and *Reed* v. *Fawick Airflex Co.*, 86 F. Supp. 822 (N. D. Ohio 1949). See Note, 69 Harv. L. Rev. 725 (1956). The House Conference Report on the Taft-Hartley Act (H. R. Rep. No. 510, 80th Cong., 1st Sess.) indicated at page 52 that in some cases there might be a concurrent remedy before the courts and before the Board.

The complaint also says the Company violated a term of the collective bargaining contract that requires notice to be given before penalties are imposed on employees. But a United States District Court has no jurisdiction, under Section 301 of the Labor Management Relations Act, 61 Stat. 156, 29 U. S. C. Section 185, or otherwise, of a union's claim that employees have been injured by an employer's breach of a collective bargaining contract. *Ass'n of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U. S. 437.

An employee discharged in violation of a collective bargaining contract may have a claim that is judicially enforceable. *Marranzano* v. *Riggs National Bank*, 87 U. S. App. D. C. 195, 184 F. 2d 349 (1950). But the claim is not enforceable in the United States District Court for the District of Columbia unless the amount in controversy exceeds $3,000. Smaller claims are within the exclusive jurisdiction of the Municipal Court for the District of Columbia. D. C. Code (1951) Section 11-755. Appellant Nelson's claim does not meet the District Court's jurisdictional requirement. During the last full year of his employment by the Company, most of his time was spent on Union work for which he was not paid or entitled to be paid by the Company, and his earnings from the Company were $618.51. It does not appear that his Company employment and earnings would have been larger in the future, or that his Company discharge affected his Union employment and earnings. Cf. *Friedman* v. *International Ass'n of Machinists*, 95 U. S. App. D. C. 128, 220 F. 2d 808. Appellants say his discharge deprived him of "the benefits of the insurance protection given under the contract, a matter of $6,000 in life insurance alone", but the record refutes this statement. The contract provides that "The employee whose service with the Company has been terminated may arrange with the Metropolitan Life Insurance Company to continue his group

life insurance under an individual policy without medical examination. However, the Paid-up Life Insurance that the employee may have purchased will continue in effect, or if he prefers he may cancel it and take the cash value".[2]

The complaint says the Company conspired with other persons to deprive the plaintiffs of constitutional rights. We need not consider whether the alleged facts would, if proved, entitle the plaintiffs to relief under the Civil Rights Act, R. S. 1980, 42 U. S. C. Section 1985(3), for the plaintiffs failed to prove any conspiracy. With respect to the Company rule or "policy" the court found, on sufficient evidence, that "Both the decision to issue such a policy and the decision as to its substance were made solely as a Company matter without any consultation or communication with any Government representatives or other persons outside the Company."

The District Court dismissed the complaint on the merits. We think the contract claims should have been dismissed for lack of jurisdiction.

Judgment affirmed in part, vacated in part.

---

[2] We do not consider whether, if the contract had not allowed a discharged employee to continue his insurance, its present value could be considered for jurisdictional purposes.

APPENDIX B

Opinion and Order of the District Court

UNITED STATES DISTRICT COURT,

DISTRICT OF COLUMBIA.

—o—

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, JOHN W. NELSON, individually, and as President of UE Local 506, on behalf of himself and all other employees of the General Electric Company similarly situated,

v.

GENERAL ELECTRIC COMPANY.

—o—

Dec. 30, 1954.

McLAUGHLIN, District Judge.

Plaintiffs in this action seek a declaratory judgment, injunctive relief and damages.

The basis of the plaintiffs' claim for relief is the discharge from employment of the individual plaintiff Nelson in accordance with defendant Company's statement of "Policy concerning Admitted Communists, Saboteurs, and Subversives; and Employees who Invoke the Fifth Amendment in Order to Refuse to Testify on such Subject."

Jurisdiction of the Court is invoked under Section 301 of the Labor Management Relations Act of 1947, 29 U. S. C. A. § 185; 42 U. S. C. A. §§ 1983, 1985(3), the Civil Rights Act; and 18 U. S. C. § 241, the section dealing with conspiracy against the rights of citizens.

Appendix B—Opinion and Order of the District Court

On September 15, 1950, the defendant General Electric Company, hereinafter referred to as defendant Company, entered into a collective bargaining agreement with the United Electrical Radio and Machine Workers of America, hereinafter referred to as the Union. This agreement as amended on June 19, 1953, is presently in full force and effect and according to its terms will continue in full force and effect until at least April 15, 1955.

In accordance with Article I of this agreement the defendant Company agreed to recognize the Union as the exclusive bargaining representative of its employees covered by said contract with respect to rates of pay, wages, hours of employment and other conditions of employment.

Defendant Company on December 9, 1953, issued the statement of policy, which forms the basis of this action. This policy provides for the immediate discharge of admitted Communists and saboteurs. It further provides that any employee who has been identified as a Communist by testimony under oath at a public hearing of a Congressional Committee or other government authority and who thereafter has declined to accept an opportunity to testify under oath before such committee or authority or has invoked the Fifth Amendment in refusing to testify concerning Communist affiliations, espionage or sabotage, shall be suspended for a period of 90 days without loss of pay. The penalty is to be imposed on any employee who had pursued either of these courses within the previous six-month period. It further provides that an employee who has been suspended can be reinstated (1) if within the 90-day suspension period he appears before the Congressional Committee or authority and fully answers under oath all questions asked him pertaining to Communist affiliations, espionage or sabotage, and in the course thereof does not admit being a Communist or being engaged in espionage or sabotage; or (2) if he obtains from an accredited security agency

of the United States and furnishes to the Company a certificate or statement that an investigation of the employee had been conducted by the agency and that no evidence was found to indicate that the employee was a Communist or otherwise a risk for employment in an industry essential to national defense. It also provides that if an employee is not entitled to reinstatement in accordance with the above provisions at the end of the 90-day period, he shall be discharged.

The plaintiff Nelson is the President of Local 306 of the Union located at Erie, Pennsylvania. This local represents the employees at the Company's Erie plant. On November 12, 1953, Nelson had appeared before a subcommittee of the Senate Judiciary Committee in response to a subpoena. At this hearing Nelson invoked the Constitutional privilege of the Fifth Amendment in answer to several questions. Two days after the promulgation of the Company's policy, on December 11, 1953, the plaintiff Nelson was suspended for 90 days according to the provisions of the policy. At the end of the 90-day period of suspension he was discharged since he had not qualified for reinstatement in accordance with the terms of the policy statement.

This action was instituted as a result of the discharge of plaintiff Nelson. The remedies prayed for are:

1. By the plaintiff Union—a declaratory judgment that the statement of policy is a violation of the collective bargaining agreement between the Union and the defendant Company.

2. By plaintiff Nelson—an injunction ordering defendant to refrain from discharging him; an order rescinding his notice of suspension and restoring his full seniority rights; an order directing defendant to refrain from dis-

charging any and all other employees similarly situated under the provisions of the statement of policy; a declaratory judgment that the suspension and threatened discharge is illegal; damages in an amount of $50,000; damages to all other employees similarly situated in amounts to be determined by the Court.

According to Article I of the collective bargaining agreement the Union is designated as the exclusive bargaining representative with respect to "conditions of employment".

It is plaintiffs' contention that the statement of policy constituted a new condition of employment and that it should have been negotiated with the Union in accordance with the agreement. Plaintiffs allege that the failure to submit the policy statement to the Union for bargaining constituted a breach of the agreement.

Defendant contends that there is no condition of employment involved but rather the question of discharge. It argues that the right to discharge is an inherent right of an employer and that it has always reserved this right in its agreements with the Union. It further contends that there is no obligation to notify the Union beforehand of the bases for discharge and, consequently, that there has been no violation of the collective bargaining agreement.

The questions posed by these respective contentions rest for determination upon the meaning and effect of the provisions of the contract relied on respectively by the parties, which meaning and effect in turn rest upon the intention of the parties. In the statement of issues made during the trial of the case the above basis for determination of meaning and effect of the contract was agreed upon by counsel for the parties. (Record 18-19, 66.)

Appendix B—Opinion and Order of the District Court

This action was previously before another branch of this Court on a motion to dismiss. In a memorandum opinion denying that motion it was stated:

> "The court does not dispute the defendants' contention that there is an inherent right on the part of the General Electric Company to employ and discharge. The question, however, before the Court at the present time is whether the Defendant Company has bargained away any of its inherent rights by its employment agreement with the plaintiff union. * * *"

[1] An employer's right to employ and discharge whom he pleases, in the absence of any statutory or contractual provision, is unquestioned. As the Court of Appeals, 10th Circuit, said in Odell v. Humble Oil & Refining Co., 201 F. 2d 123, 128, certiorari denied 345 U. S. 941, 942, 73 S. Ct. 833, 97 L. Ed. 1367.

> "It is the universally recognized rule that in the absence of a contract or statutory provisions an employer may discharge an employee without cause or reason or for any cause or reason. * * * (Citing cases.)"

In speaking of the effect of the National Labor Relations Act upon the right of the employer to discharge, the Court in N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1, at pages 45-46, 57 S. Ct. 615, at page 628, 81 L. Ed. 893, said:

> "The act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled

> to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion. * * *"

In the Labor Management Relations Act of 1947, 29 U. S. C. A. § 141 et seq. the right of the employer to discharge for cause was specifically preserved by a provision in Section 10(c), 29 U. S. C. A. § 160(c) to the effect that

> "* * * No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. * * *"

[2] The basic question involved in this action then appears to be whether the defendant bargained away its inherent right of discharging its employees when it executed the collective bargaining agreement.

[3] The answer to this question rests upon an interpretation of the agreement. In Victory Investment Corporation v. Muskogee Electric Traction Co., 10 Cir., 150 F. 2d 889, at page 893, 161 A. L. R. 1436, the rule is announced as follows:

> "The cardinal rule in the interpretation of contracts is to ascertain the mutual intention of the parties at the time their minds met upon the terms of the agreement and to give effect to that intention if it can be done without doing violence to the language used."

See also Bradley v. Washington, Alexandria & Georgetown Steam-Packet Co., 13 Pet. 89, 97, 38 U. S. 89, 97, 10 L. Ed. 72.

Accordingly the Court must determine what these parties intended at the time they executed the agreement. If

it appears that they intended that the discharge of employees covered by the contract should be subject to review by some third party, either by a court or by arbitrator, then the discharge of plaintiff Nelson constitutes a violation of the agreement. If it appears, however, that it was intended that the Company reserved the right to discharge employees and merely agreed that thereafter such discharge should be made the subject of discussion and of bargaining through the grievance mechanism set up in the contract and that determinations arrived at through the operation of that mechanism would be final, then the discharges in question would not violate the agreement, if discussion and bargaining ensued.

There are three sections of the agreement which are immediately involved in the determination of the question as to what the parties intended with regard to discharges. The pertinent sections are Article I(1)[1] regarding Union recognition. Article XV(3)(a)[2] relating to the procedure

---

[1] "1. The Company agrees to recognize the Union on behalf of and in conjunction with its Locals for those bargaining units of Company employees for which the Union or any of its Locals, through National Labor Relations Board certifications, is designated as the exclusive collective bargaining representative of employees within such units for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment."

[2] "(a) Before any penalty is imposed upon any employee following Warning Notices, except for discharge for obvious cause, such employee shall be notified one week in advance during which time he may refer the matter to the Local representative and if the Local so desires, the matter may be negotiated with the Management. If no satisfactory agreement is worked out during the period of such notice, the Management shall retain the right to impose such penalty pending final settlement of the case."

for disciplinary cases, and Article XVI(1)[3] relating to arbitration.

Article XV(3)(a) sets out the rights of the parties with respect to disciplinary discharges. It provides that an employee is entitled to a warning notice and then to a notification one week in advance of any penalty discharge, "except for discharge for obvious cause." The defendant Company by the terms of this section has thus been restricted in its right to discharge but has reserved the right to discharge immediately for "obvious cause."

The agreement does not contain a definition of the term "obvious cause" as used in Article XV(3)(a). The record discloses however (Transcript, pp. 448-451) that the term was inserted in the agreement at the instance of the defendant as a protection of its right to discharge those employees whom it considered undesirable and therefore who should be immediately removed from the plant. The record further discloses (Transcript, pp. 429-434) that offenses for which an employee would be subject to immediate discharge were determined by the Company without prior notice to the Union. An instruction sheet from the Erie Works of the defendant Company (Defendant's Exhibit No. 5) sets out several grounds as bases for immediate discharge, among which are: wilful insubordination, theft, drunkenness, immoral behavior and wilful destruction of company property. It appears that in the issuance of this instruction sheet, at least, the Company determined the grounds for immediate discharge, and that it did not consult the Union in advance of such determination (Tran-

[3] "1. Any grievance which involves the interpretation or application of this Agreement, and which remains unsettled after having been fully processed pursuant to the provisions of Article XV shall be submitted to arbitration upon request of either the Union or the Company provided such request is made within 90 days after the decision of the Company has been given to the Union pursuant to Article XV, Section 1(c) * * *."

script, p. 510). From the foregoing the Court is of the opinion that the conclusion may reasonably be drawn that the Company has taken the position that it would hear Union protests through the grievance mechanism after the discharge had been effected and the Union had been advised of this position.

In view of defendant's right to discharge for obvious cause and the practice that it determined unilaterally what constituted the basis for such a discharge, the Court must determine whether the invocation of the Fifth Amendment privilege by the discharged employees presented such a situation as would justify defendant in immediately discharging them.

[4] According to defendant, "obvious cause" was intended to cover "those things which in the opinion of management made an employee an undesirable employee and therefore one who should be immediately removed from the plant" (Transcript, p. 488). There was testimony that defendant was criticized by its stockholders and customers after its employees had relied upon their Fifth Amendment privilege before Congressional Committees. There was also evidence of unrest among fellow employees, and in one instance of refusal to work on the same job with one of the employees who had refused to testify regarding his Communist affiliations. (Defendant's Exhibits 16 and 17.) It appears to the Court that the threatened loss of good will, displeasure of stockholders and prospective customers, disruption of plant morale and the grave doubts as to the security of employees and its plants, all resulting from the refusal of its employees to testify before Congressional Committees, justified defendant in immediately discharging such employees for obvious cause.

The plaintiffs have argued that the evidence of dissension and impaired morale among fellow employees has no bear-

ing on this proceeding since the individual involved in the only instance cited by defendant was employed at a different plant and was not a member of the plaintiff Union. The Court is of the opinion, however, that evidence of the effects above outlined produced by the refusal of any of the employees of defendant Company to testify, in violation of the interdiction contained in the Company's statement of policy, regardless of plant location or union membership, has a bearing upon the matter of defendant's designation of the offense in question as a ground for immediate discharge and so should be considered.

[5] The next section of the agreement which is involved in the determination of intention is Article I(1). Plaintiffs contend that the statement of policy comes within the meaning of the term "other conditions of employment" as used in that Article and that it should have been negotiated with the Union before being put into effect. Article XV(3)(a) recognizes the right of defendant to discharge for disciplinary reasons and sets out in specific detail the procedure relating to the handling of such discharges. In view of this fact the Court is not persuaded that it was intended by the parties to the agreement that the term "other conditions of employment" as used in Article I(1) should negate the right of the defendant to discharge in accordance with Article XV(3)(a).

[6] Plaintiffs contend that they were entitled to discussions and negotiation with respect to the question of the propriety or the justifiability of discharges under the statement of policy. The Court recognizes that in the usual disciplinary discharge, i.e., for theft, drunkenness, etc., sometimes there are many circumstances to be considered, e.g., guilt or innocence of the act charged; work record; restitution; promise to refrain from such conduct,

and that a consideration of these items sometimes leads to a determination that the discharge was wrongly imposed or that a lesser penalty would be commensurate with the offense. In the instant case, however, the Court is not persuaded that discussion and negotiation would serve any useful purpose.

Following the publication by defendant of the statement of policy, meetings were held between representatives of defendant Company and of the Union at which discussions were had with reference to said statements. In none of the discussions, so far as the record discloses, did the Union challenge the fact that Company employees had invoked the Fifth Amendment in refusing to answer questions before Congressional Committees. At no place in the Union's briefs in support of its position or in argument of counsel for the Union has such a challenge been made. The thrust of the Union's argument is against the Company right, in the circumstances, to discharge an employee who admittedly has thus invoked the Fifth Amendment. Nor in the Court's opinion, in the circumstances, is there cogency in the suggestion that consideration of the work record of the affected employee would be material; or of a promise on his part to refrain from such conduct; or of the imposition of a penalty of lesser degree than suspension and, if applicable, of discharge. As stated elsewhere in this opinion, opportunity was provided by the statement of policy for any employee who had refused to answer questions behind the shield of the Fifth Amendment to relieve himself from the effects of the operation of its discharge provisions by appearing before the pertinent Committee and answering the questions under oath as outlined in the statement of policy or obtaining security clearance.

[7] The complaint of the Union concerning the above discussions is that the Company refused to negotiate. The

record (Transcript, pp. 101, 160, 613) establishes that the Union asked that the defendant Company recede from its position as set forth in the statement of policy. The Court has not been persuaded that it has been demonstrated that the defendant Company refused to negotiate. The invoking of the Fifth Amendment by employees being admitted, there remained only the question or point of whether defendant Company would adhere to or abandon its position. The discussion of that question or point took place. In the Court's opinion that, in the circumstances, constituted negotiation. Indeed the situation raises the question "What further negotiations could take place?" The invoking of the Fifth Amendment by employees had produced the results, elsewhere referred to herein, which were harmful and damaging to the Company. Unlike other offenses or derelictions, the effects of which upon the Company might have been erased or ameliorated by negotiations resulting in the taking of a position by the Company that the offending employee should, in the circumstances, be penalized in a manner less drastic than discharge or be given another chance without immediate penalty, the invoking of the Fifth Amendment was a step which once taken produced the harmful effects complained of, which effects the Company concluded could not be erased or ameliorated without the pursuing of the course left open to the employee so invoking the Amendment in accordance with the provisions of the statement of policy.

[8] Article XVI(1) of the agreement, dealing with arbitration, is the third section of the agreement which is immediately involved in the determination. It is contended by the plaintiff that the discharge under the statement of policy should have been submitted to arbitration in accordance with that section of the collective bargaining agreement. It appears from the record (Transcript, pp. 461-465) that the arbitrability of discharges was discussed by

the parties during several negotiations but that no agreement was ever reached on the point. In view of the disagreement on this point the Court is unable to conclude that it was intended to subject discharges to arbitration.

The plaintiffs claim that there has been a deprivation of the Fifth Amendment rights of those employees discharged as a result of invoking the privilege. There is no claim that the employees were not permitted to invoke the privilege but rather that their discharge because of their reliance upon the privilege violated a constitutional right. The defendant, on the other hand, claims that the protection of the Fifth Amendment does not extend that far. It contends that once a person relies upon the privilege his constitutional guarantee has been fulfilled and he is not entitled to protection from loss of employment.

While discharges as a result of relying upon the Fifth Amendment present a novel question in the field of private employment, there appears to be considerable authority for discharging governmental employees, both Federal and Municipal, for such action.

The Federal Employees Security Program provides that "Refusal by the individual, upon the ground of constitutional privilege against self-incrimination, to testify before a congressional committee regarding charges of his alleged disloyalty or other misconduct" is a factor to be considered in the security investigations of Federal employees, Ex. Ord. 10491, 5 U. S. C. A. § 631 note, 18 F. R. 6583.

In Orloff v. Willoughby, 345 U. S. 83, 73 S. Ct. 534, 97 L. Ed. 842, the Supreme Court held that invocation of the Fifth Amendment by a doctor in answer to questions regarding membership in subversive organizations was a sufficient ground for denying him a commission in the Army Medical Corps. In Shlakman v. Board of Higher Education, 282 App. Div. 718, 122 N. Y. S. 2d 286, affirmed 306

N. Y. 532, 119 N. E. 2d 373, it was held that teachers in municipal colleges in New York City were properly discharged under a City Charter provision, as a result of their having invoked the Fifth Amendment in answer to questions regarding present or past membership in the Communist Party. It was held that the Charter provision, which provided for discharge in the case of City employees who invoked the Fifth Amendment, did not abridge the constitutional privilege against self-incrimination. In Christal v. Police Commission of San Francisco, 33 Cal. App. 2d 564, 92 P. 2d 416, where police officers had been dismissed as a result of their reliance upon the Fifth Amendment privilege, it was held that while the officers had a constitutional right to refuse to answer questions regarding bribes or gratuities, they had no constitutional right to remain police officers in the face of this violation of their duty.

Although the persons involved in the cases cited were all in governmental service of one type or another, the Court is not persuaded that a person relinquishes any of his Constitutional rights by virtue of his entry into public service.

[9, 10] The Fifth Amendment guarantee provides "* * * nor shall any person * * * be compelled in any criminal case to be a witness against himself * * *." This Amendment does not guarantee that a person who invokes it will not be subject to any unfavorable inference. Maffie v. United States, 1 Cir., 209 F. 2d 225, 228. The Court concludes that it likewise does not guarantee that the person invoking it shall be continued in his employment. In view of this the Court holds that the discharge of the employees under the Statement of Policy did not constitute an interference with their Constitutional rights.

[11] Plaintiffs assert and rely upon the proposition that in entering into the collective bargaining agreement the parties thereto, i.e., the Union and the Company, agreed that the Company had bargained away its right to discharge employees, in that its right to discharge was no longer unqualified but subject to all the conditions to which conditions of employment were subjected by the provisions of that agreement. It is elementary in an action that the party asserting a proposition has the burden of proof of establishing it. The Court is unable to conclude from the evidence that the plaintiffs have met this burden of proof. The Court thus finds that it was not the intention of the parties at the time they executed the agreement that defendant Company's right to discharge for obvious cause should be impaired by the collective bargaining agreement.

[12] The Court further finds that discharges under the statement of policy were discharges for obvious cause; that the parties did not intend that the discharge of employees covered by the contract should be subject to review by any third party, either Court or arbitrator; that since defendant retained the right to discharge for obvious cause it was not obligated to negotiate with the Union before discharging a person on that ground; that there was no violation of the collective bargaining agreement when the discharge in question was not negotiated with the Union in advance of the issuance of the statement of policy.

[13, 14] In addition to their contentions concerning questions involving the contract, the plaintiffs have also charged that defendant, through its management and officers, conspired with members of the staff of the permanent Subcommittee on Investigation of the Senate Government Operations Committee to deprive the individual plaintiff of his civil rights. It is likewise elementary that the plain-

tiff in a civil conspiracy case has the burden of proving the existence of the conspiracy which it alleges to exist. Upon a consideration of the entire record in this case the Court finds that the plaintiffs have failed to sustain the burden of proving the alleged conspiracy.

For the reasons indicated, the prayers of plaintiffs' complaint are denied.

Counsel for defendant will prepare appropriate findings of fact, conclusions of law and order.

CHARLES F. MCLAUGHLIN,
U. S. D. J.

Dated: February 15, 1955.

Order of the District Court

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

—o—

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, JOHN W. NELSON, individually, and as President of UE Local 506, on behalf of himself and all other employees of the General Electric Company similarly situated,

v.

GENERAL ELECTRIC COMPANY.

—o—

This cause having come on to be heard and after taking evidence, hearing argument of counsel and considering the briefs and memoranda filed by the parties, on the basis of the annexed findings of fact and conclusions of law and the Court's Memorandum of December 30, 1954,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment shall be and hereby is entered for defendant dismissing the complaint with costs.

CHARLES F. McLAUGHLIN,
U. S. D. J.

Dated: February 15, 1955.

Seen:

JOSEPH FORER,
Attorney for Plaintiffs.

APPENDIX C

Contract Provisions

Article I, Union Recognition

1. The Company agrees to recognize the Union on behalf of and in conjunction with its Locals for those bargaining units of Company employees for which the Union or any of its Locals, through National Labor Relations Board certifications, is designated as the exclusive collective bargaining representative of employees within such units for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment.

• • •

Article XV, Grievance Procedure

1. Any dispute or grievance shall be taken up in accordance with the procedure set forth below. However, either party may, at the appropriate step of the grievance procedure, introduce grievances of a general nature or general questions of interpretation or application of this Agreement. In such instances the grievance procedure shall be considered as fully exhausted after the reply to the grievance is given at Step Three.

(a) Step One

(1) Grievances will be presented to the Foreman by an employee and his Steward or by the Steward. However, a grievance affecting an employee individually may be taken up by the employee involved, if he so desires.

(2) The Foreman shall give his answer to the employee and his Steward jointly, within one working day after the presentation of the grievance or advise them

that additional time is needed, in which event the Foreman shall give his answer within five working days after the presentation of the grievance.

(3) If a settlement is not reached between the Steward and the Foreman, the Local may refer the grievance to two representatives of the Local for a discussion in the Department with representatives of Management for settlement if possible.

(b) Step Two

(1) If no satisfactory settlement is reached at Step One within two weeks after the Foreman's answer is given, the matter may at the opinion of the Local be referred to representatives of the Local and local Management.

(2) Representatives designated by the Local and local Management shall meet within five working days after such referral to Step Two to discuss the matter.

(3) In those cases where it is mutually agreed by Management and Local representatives that an inspection of the job would be helpful in settling the case, a subcommittee of the Local with Management representatives shall be allowed to make an inspection of the job. Local representatives may include the Business Agent or his assistant or officers of the Local.

The Works Manager will meet with the Local rep-representatives by mutual agreement on Step Two cases.

(4) The reply of local Management will be given the Local within five working days after the first meeting provided for in Step Two. This time may be extended by mutual agreement.

(5) If local Management's reply to a dispute or grievance at Step Two is unsatisfactory, the Local may

choose to take the dispute or grievance to Step Three, in which case the Local will notify local Management.

(c) Step Three

(1) If no satisfactory agreement is reached at Step Two, the dispute or grievance may be referred to Step Three, the final step of the grievance procedure, for the consideration of designated representatives of the Union and the Company.

(2) The Union will submit such cases to the Company one week before the meeting takes place between the representatives of the Union and the Company.

(3) Regular monthly meetings will be held between the Union and the Company to dispose of cases submitted by the Union. An emergency meeting on a given grievance will be held within three days after notice by the Union.

(4) The Company will give its final reply to the Union in not more than five days after the initial discussion at Step Three. In emergency meetings, the reply will be given at the close of the meeting. These times may be extended by mutual agreement.

(5) When a Local refers a dispute or grievance at Step Three, the grievance procedure shall be considered as fully exhausted only after the Union advises the Company that the Company's reply at Step Three is unsatisfactory, except in those cases which are submitted to arbitration.

2. Written Replies

On a request, a written reply shall be given to a grievance submitted in writing at any step of the grievance procedure.

3. Procedure for Disciplinary Cases

(a) Before any penalty is imposed upon any employee following Warning Notices, except for discharge for obvious cause, such employee shall be notified one week in advance during which time he may refer the matter to the Local representative and if the Local so desires, the matter may be negotiated with the Management. If no satisfactory agreement is worked out during the period of such notice, the Management shall retain the right to impose such penalty pending final settlement of the case.

(b) In the event it is determined that an employee has been improperly penalized, he will be reimbursed for any loss of wages sustained as a result of the imposition of the penalty.

FILED
SEP 19 1956
JOHN T. FEY, Clerk

Supreme Court of the United States

October Term, 1956

No. 267

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, et al.,
Petitioners,

v.

GENERAL ELECTRIC COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

GERHARD A. GESELL
BURKE MARSHALL
701 Union Trust Bldg.
Washington 5, D. C.

WILLIAM J. BARRON
570 Lexington Avenue
New York 22, New York
Attorneys for Respondent

INDEX

PAGE

Opinions Below 1

Jurisdiction 1

Questions Presented 2

Statutes Involved 3

Statement of the Case 3

Reasons for Opposing the Grant of the Writ 8

I. The Majority of the Questions Presented by Petitioners Are Wholly Without Merit and Require No Extended Discussion 8

II. The Primary Jurisdiction Question Raised by the Petition Is Not Appropriate for Review by Writ of Certiorari Since the Decision Below Is Clearly Correct, Is Not in Conflict With Any Other Decision, and Concerns Only a Contract Issue Which Is Moot 10

A. The Decision of the Court of Appeals That the National Labor Relations Board Had Primary Jurisdiction Over the Claimed Refusal to Bargain Was Correct and Is Not in Conflict With Any Decisions of This Court or of Other Federal Courts 10

B. The Contract Under Which the Controversy Concerning the Promulgation of the Policy Arose Is no Longer in Effect and This Aspect of the Controversy Is Accordingly Moot 17

III. The Evidentiary Ruling of the District Court on the Senate Claim of Privilege Presents No Substantial Question and Is Also Inappropriate for Review by Writ of Certiorari 19

PAGE

A. The District Court's Ruling Is Clearly Correct, Is Not in Conflict With Any Other Decisions, and Accordingly Does Not Present a Question Appropriate for Review by Certiorari 19

B. This Case Does Not in Any Event Properly Involve Any Question of the Validity of the District Court's Ruling 22

Conclusion 23

Appendix A—Findings of Fact and Conclusions of Law of the District Court 1a

Appendix B—Additional Statutes and Rule Involved.. 1b

CITATIONS

CASES:

Aaron Burr, Trial of, Case No. 14,694, 25 Fed. Cas. 187 (C. C. D. Va. 1807) 21

Aetna Casualty & Surety Co. v. *Flowers*, 330 U. S. 464 9

Amalgamated Utility Workers (C. I. O.) v. *Consolidated Edison Co.*, 309 U. S. 261 17

American Airlines v. *North American Airlines*, 351 U. S. 79 9

American Optical Co. v. *Andert*, 108 F. Supp. 252 (W. D. Mo. 1952) 15

Anson v. *Hiram Walker & Sons*, 222 F. 2d 100 (7th Cir. 1955), cert. denied 350 U. S. 840 15

Baldwin v. *Franks*, 120 U. S. 678 23

Bates v. *United States*, 323 U. S. 15 9

Betty Brooks Co., 99 NLRB 1237 (1952) 12

PAGE

Calmar S. S. Corp. v. *Scott*, 345 U. S. 427 9
Collins v. *Hardyman*, 341 U. S. 651 23

FCC v. *WJR, The Goodwill Station*, 337 U. S. 265 9

Garner v. *Teamsters, Chauffeurs & Helpers Local Union No. 776 (A. F. L.)*, 346 U. S. 485 .....16, 17
Guaranty Trust Co. v. *United States*, 304 U. S. 126 9

H. J. Heintz Co. v. *NLRB*, 311 U. S. 514..... 12
Hodges v. *United States*, 203 U. S. 1 23
Hurtado v. *California*, 110 U. S. 516 23

Independent Petroleum Workers of N. J. v. *Esso Standard Oil Co.*, F. 2d , 38 LRRM 2307 (3rd Cir. June 26, 1956) 14
Inland Lime & Stone Co., Matter of, 24 NLRB 758 (1940) 12

Kellogg Switchboard & Supply Co., Matter of, 28 NLRB 847 (1941) 12

Marconi Wireless Telegraph Co. v. *Simon*, 246 U. S. 46 9
Massey Gin & Machine Works, 78 NLRB 189 (1948) 12
Maxwell v. *Dow*, 176 U. S. 581 23
McDonnell Aircraft Corp., 109 NLRB 930 (1954) 12, 16
McQuay-Norris Manufacturing Co., Matter of, 21 NLRB 709 (1940), enforced 116 F. 2d 748 (7th Cir. 1940), cert. denied 313 U. S. 565..... 12

NLRB v. *Pittsburgh S. S. Co.*, 337 U. S. 656..... 9
NLRB v. *Standard Oil Co.*, 196 F. 2d 892 (6th Cir. 1952) 16

Post Publishing Co. v. *Cort*, Mass. , N. E. 2d , 38 LRRM 2198 (1956)..... 16

Schriber-Schroth Co. v. *Cleveland Trust Co.*, 305 U. S. 47 9
Slaughter-House Cases, 16 Wall. 36 (1872)..... 23
Spielberg Manufacturing Co., 112 NLRB 1080 (1955) 16

PAGE

Textile Workers Union of America, CIO v. *Arista Mills Co.*, 193 F. 2d 529 (4th Cir. 1951)..... 15
Tunstall v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210..... 9
Twining v. *New Jersey*, 211 U. S. 78..... 23

United Electrical, Radio & Machine Workers of America v. *Worthington Corp.*, F. 2d , 38 LRRM 2507 (1st Cir., July 31, 1956)..... 14
United Packing House Workers of America v. *Wilson & Co.*, 80 F. Supp. 563 (N. D. Ill. 1948).. 15
United States v. *Ballard*, 322 U. S. 78..... 9
United States v. *Beach*, 324 U. S. 193..... 9
United States v. *Cruikshank*, 92 U. S. 542..... 23
United States v. *Harris*, 106 U. S. 629..... 23
United States v. *Reynolds*, 345 U. S. 1 .....20, 21
United Telephone Co., 112 NLRB 779 (1955).... 16

Westinghouse Salaried Employees v. *Westinghouse Electric Corp.*, 348 U. S. 437..... 7

STATUTES:

Civil Rights Act:

R. S. 1980, 42 U. S. C. § 1985 (3) 2, 6

Labor-Management Relations Act:

Sec. 8(a)(5) (61 Stat. 140, 29 U. S. C. A. § 158(a)(5)) 10, 11, 12, 15, 17

Sec. 301 (61 Stat. 156, 29 U. S. C. A. § 185(a)) 3, 7, 9, 12, 13, 17

District of Columbia Code § 11-755..... 3, 9

CONGRESSIONAL MATERIAL:

H. R. Res. 193, 82nd Cong., 1st Sess., 97 Cong. Rec. 3800 (1951) 22

H. R. Res. 105, 83rd Cong., 1st Sess., 99 Cong. Rec. 498 (1953) 22

PAGE

H. R. Res. 469, 83rd Cong., 2nd Sess., 100 Cong. Rec. 3046 (1954) 22

H. R. Res. 296, 84th Cong., 1st Sess., 101 Cong. Rec. 8412 (daily ed. July 1, 1955) 22

MISCELLANEOUS:

Brownell, Memorandum on Separation of Powers, 14 Fed. B. J. 73 (1954) 22

Rule 23(a) Federal Rules of Civil Procedure 3, 22

6 Cannon's Precedents § 587 (1936) 22

3 Hinds' Precedents § 2663 (1907) 22

40 Ops. Att'y Gen. 45 (1949) 22

Op. Gen. Counsel NLRB, Case No. 799, 32 LRRM 1620 (1953) 12

Op. Gen. Counsel NLRB, Case No. 883, 33 LRRM 1234 (1954) 12

Supreme Court of the United States

October Term, 1956

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, et al., *Petitioners,* v. GENERAL ELECTRIC COMPANY, *Respondent.*	No. 267

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals is reported at 231 F. 2d 259. The opinion of the District Court dismissing the complaint on the merits is reported at 127 F. Supp. 934. The Findings of Fact and Conclusions of Law of the District Court (J. A. 785) are printed as Appendix A to this Brief.

Jurisdiction

The basis for the jurisdiction of this Court is adequately stated in the petition.

Questions Presented

This case involves claims by the Union and Nelson for alleged breaches of a collective bargaining contract between the Union and respondent General Electric and a claim by Nelson on behalf of himself and other employees of General Electric similarly situated for relief under the Civil Rights Act (R. S. 1980, 42 U. S. C. 1985(3)). The petition lists eight questions, but, as noted more fully at pages 8-10 below, only two questions can realistically be said to be of sufficient substance to call for discussion on the present record.

As to the claimed violations of the collective bargaining contract, the Court of Appeals unanimously held (Judges Edgerton, Washington and Danaher) that the District Court was without jurisdiction to hear the controversy. No issue as to the merits is presented since these were neither reached nor determined by the Court of Appeals and the contract in any event is no longer in effect. The sole question of any substance presented on this phase of the litigation is the validity of the determination of the Court of Appeals that the Union's claim of a refusal to bargain prior to the promulgation of the discharge policy presents an issue within the exclusive primary jurisdiction of the National Labor Relations Board.

As to the claim for relief under the Civil Rights Act, the District Court found that the alleged conspiracy did not exist in fact. The Court of Appeals determined that this finding was based upon sufficient evidence. Petitioners attempt to avoid the concurrent findings of two lower courts by challenging an evidentiary ruling of the District Court. The United States Senate having by unanimous resolutions invoked its privilege over certain documents and testimony sought by petitioners from one of its committees, the District Court ruled that it would not require the production

of the documents or permit examination of the witnesses. Petitioners failed to make use of other sources of evidence made available to them, or to make any showing that the evidence of the Senate committee was necessary to their case. In this Court, petitioners do not claim that the District Court's determination was in conflict with any other decision. The question presented is whether the District Court's evidentiary ruling on the Senate claim of privilege, which was affirmed without discussion by the Court of Appeals, was correct.

Statutes Involved

In addition to the statutes found in the petition, Section 301(a) of the Labor-Management Relations Act, 29 U. S. C. A. § 185(a), Section 755 of Title 11, D. C. Code, and Rule 23(a) of the Federal Rules of Civil Procedure, all of which are pertinent, appear in Appendix B to this brief and are referred to in the course of the text.

Statement of the Case

On December 9, 1953, General Electric issued a discharge policy applicable to all employees of the Company, whether or not members of the petitioner or any other union (Finding of Fact No. 3). Insofar as here pertinent this policy provided that the Company would immediately suspend with pay and ultimately discharge, if certain stated conditions were not satisfied, any employee who appeared at a public hearing before a duly authorized governmental body and refused by invoking the Fifth Amendment or otherwise to respond to questions pertaining to Communist affiliations, espionage or sabotage. The District Court found that the statement of policy was issued by reason of the conduct of certain of the Company employees

who invoked their privilege against self-incrimination. The court found their refusal to respond to questions pertaining to Communism, espionage or sabotage,

> "both in the opinion of the management and in fact subjected General Electric to widespread adverse publicity and adverse criticism from stockholders and customers, injured the Company's good name, threatened the Company with loss of good will, created unrest among Company employees, disrupted plant morale and raised grave doubts as to the security of the Company's plants which were shown to be important to the national defense." (Finding of Fact No. 2)

At the time the policy was promulgated General Electric was confronted with further hearings involving its employees on the subject of Communism, espionage and sabotage and several such hearings were in fact held (Finding of Fact No. 2).

The Union and Nelson, invoking the collective bargaining contract between the Company and the Union, challenged General Electric's right to issue this discharge policy, which was applied to a few members of the petitioner Union as well as to certain other employees. The complaint alleged that the policy breached the contract in that it was issued without advance discussion with the Union. It was asserted that this action violated an alleged duty imposed on the Company by the Labor-Management Relations Act. This duty was claimed to be incorporated into the contract by the Company's routine agreement to recognize the Union as "the exclusive collective bargaining representative . . . in respect to rates of pay, wages, hours of employment and other conditions of employment." The complaint also alleged that the policy by its terms violated certain substantive provisions of the contract (J. A. 5-11). After a full trial without a jury, at which extensive testimony was taken as to the meaning and effect of the contract and other issues

in the case, the District Court made findings of fact and conclusions of law in favor of General Electric on the merits as to each of these contentions.

The court found that there was no provision of the contract which was ever intended by the parties to require General Electric to give the Union advance notice of rules relating to discharge or to bargain prior to putting the rules into effect (Finding of Fact No. 4). Not only had it been the practice of the Company to issue rules stating grounds for immediate discharge without prior consultation with the Union, but it was clear that Article I, the Union recognition clause on which the Union relies, did not prohibit unilateral action. The clause was simply designed to obligate the Company to recognize the Union as the sole and exclusive bargaining agent of the employees covered by the agreement (*ibid.*).

The District Court further found that the collective bargaining contract between General Electric and the Union did not specify the type of conduct which the Company might make the basis for immediate discharge (Finding of Fact No. 5). The findings of fact show that it was the intention of the parties that the Company could take such disciplinary action as it deemed appropriate in a particular case and that the Union might then challenge the Company's action through the grievance machinery of the contract (*ibid.*). In the event the Company and the Union could not settle a question as to a discharge through the grievance machinery, the Company's decision as to the penalty would prevail and the Union had the right to strike (Finding of Fact No. 8). While one week's warning notice was required for certain types of disciplinary action, the contract provided that discharges for "obvious cause" could be made without such notice (Article XV (3)). The term "obvious cause" had no special or limited meaning and was intended simply to preserve the right of the Company to discharge

those employees whom it considered undesirable and therefore who should be removed immediately from the plants (Finding of Fact No. 7). The parties did not intend and the agreement did not provide that discharges would be subject to review either by arbitration or by the courts (Finding of Fact No. 9).

Following the promulgation of the policy the Union protested to the Company and the court found that immediately thereafter "officials of General Electric met with representatives of the Union, heard their grievances fully and bargained in good faith concerning the policy" (Finding of Fact No. 6). The court found further that General Electric was at all times ready and willing to negotiate and did negotiate concerning the policy, the need for it and its terms and operation with the Union representatives both through the grievance machinery and otherwise (*ibid.*).

Petitioner Nelson in addition asserted that the discharge policy violated the Civil Rights Act (R. S. 1980, 42 U. S. C. 1985 (3)), claiming that General Electric had conspired with employees and agents of the Senate Permanent Subcommittee on Investigations by agreeing that General Electric would suspend and discharge employees who asserted any Constitutional right or privilege as a reason for declining to answer questions relating to Communist associations.

The District Court found that General Electric's decision to issue the policy in question as well as its decision as to the substance of the policy "were made solely as a Company matter without any consultation or communication with any Government representatives or other persons outside the Company" (Finding of Fact No. 1). The District Court also found that "plaintiffs failed to prove any concerted action, conspiracy, plan or program between the Company and members of the staff of the Permanent Subcommittee on Investigations of the Senate Committee on

Government Operations to deprive Nelson or any other employee of General Electric of his civil rights or any understanding or agreement between the Company and such staff members in any way relating to, affecting, or bearing on employment or discharge by General Electric" (Finding of Fact No. 11). These findings led the court to its conclusion of law that no violation of the Civil Rights Act was established (Conclusion of Law No. 3).

Throughout the litigation before the District Court, General Electric had contended that the court was without jurisdiction to entertain the controversy. The District Court, without ruling on the various jurisdictional issues, disposed of the case on the merits as indicated above. When petitioners appealed to the Court of Appeals, General Electric again renewed the jurisdictional objections. The Court of Appeals ruled that the District Court had been without jurisdiction to entertain any of the contract issues in the case. The Court of Appeals accordingly did not pass on the correctness of any of the District Court's findings or conclusions of law on the merits of the contract issues.

The Court of Appeals held that the claims of the Union that General Electric had refused to bargain were simply allegations of an unfair labor practice and were hence under the primary jurisdiction of the National Labor Relations Board. The court held further that claims by the Union based on Section 301 of the Labor-Management Relations Act that employees had been injured by violation of the terms of the collective bargaining contract could not be asserted by the Union under the doctrine of this Court's decision in *Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U. S. 437.[1] In respect of Nel-

[1] In this Court the Union no longer relies on Section 301 of the Labor-Management Relations Act and for the first time attempts to invoke the general jurisdiction of the District Court for the District of Columbia.

son's claims involving his discharge pursuant to the policy, the court held that Nelson, who failed to appear as a witness, had not met the jurisdictional requirements of the District Court in that he had failed to establish that his discharge involved an amount in excess of $3,000. Nelson received his primary compensation from the Union, which continued after his discharge. The court held that he was not adversely affected in a monetary sense by any other aspect of his discharge in that his rights under a company insurance policy could be continued.

As to the claimed violation of the Civil Rights Act, the Court of Appeals stated that plaintiffs had failed to prove any conspiracy as alleged and that the District Court's finding that the decision to issue the policy and as to its substance was solely a matter determined within the Company was based on "sufficient evidence." The court without comment thus also disposed of the appeal taken from the evidentiary ruling of the District Court upholding the Senate claim of privilege.

Reasons for Opposing the Grant of the Writ

I

THE MAJORITY OF THE QUESTIONS PRESENTED BY PETITIONERS ARE WHOLLY WITHOUT MERIT AND REQUIRE NO EXTENDED DISCUSSION.

The petition in this case presents eight questions, and proceeds to argue that each of the eight questions is in itself an important question and appropriate for review by certiorari. Only two of these eight questions (questions number one and three) require any discussion. The following brief examination of the other six questions will show they do not under any circumstances warrant exercise of this Court's certiorari jurisdiction.

Questions number two and four present points not presented to the Court of Appeals and not decided by that court. Question number two, discussed at pages 17-19 of the petition, is based upon the Union's attempt for the first time to ground the jurisdiction of the District Court on its general jurisdiction in the District of Columbia, rather than on Section 301 of the Labor-Management Relations Act. Question number four, discussed at pages 23-24 of the petition, is also a jurisdictional argument raised for the first time in the Petition for Certiorari.

The points raised by questions five and six of the petition involve routine application of established rules in the District of Columbia for the determination of jurisdictional questions as between the District Court for the District of Columbia and the Municipal Court, which has exclusive jurisdiction over common law controversies involving less than $3,000 (D. C. Code, Title 11, § 755).

Questions seven and eight, discussed at pages 25-31 of the petition, go to the merits of the case. These issues were decided favorably to General Electric by the District Court but were not considered by the Court of Appeals, and hence would not be passed upon by this Court under its well-settled practice of affording Courts of Appeals opportunity to pass on all the issues presented by a case.[2]

There remains only the issue of the appropriateness for certiorari review of the first and third questions presented

---

[2]See, for example, American Airlines v. North American Airlines, 351 U. S. 79, 86; Calmar S. S. Corp. v. Scott, 345 U. S. 427, 444; FCC v. WJR, The Goodwill Station, 337 U. S. 265, 285; NLRB v. Pittsburgh S. S. Co., 337 U. S. 656, 661-662; United States v. Beach, 324 U. S. 193, 196; Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U. S. 210, 214; Bates v. United States, 323 U. S. 15, 17; United States v. Ballard, 322 U. S. 78, 88; Schriber-Schroth Co. v. Cleveland Trust Co., 305 U. S. 47, 61; Guaranty Trust Co. v. United States, 304 U. S. 126, 144. Cf. Aetna Casualty & S. Co. v. Flowers, 330 U. S. 464, 468; Marconi Wireless Telegraph Co. v. Simon, 246 U. S. 46, 57.

by the petition, which will now also be shown not to meet the requirements for certiorari review established by the rules of this Court.

II

THE PRIMARY JURISDICTION QUESTION RAISED BY THE PETITION IS NOT APPROPRIATE FOR REVIEW BY WRIT OF CERTIORARI SINCE THE DECISION BELOW IS CLEARLY CORRECT, IS NOT IN CONFLICT WITH ANY OTHER DECISION, AND CONCERNS ONLY A CONTRACT ISSUE WHICH IS MOOT

A. The Decision of the Court of Appeals That the National Labor Relations Board Had Primary Jurisdiction Over the Claimed Refusal to Bargain Was Correct and Is Not in Conflict With Any Decisions of This Court or of Other Federal Courts

The complaint filed in the District Court relied on the language of Article I of the contract, which used the wording of the Labor-Management Relations Act in obligating the Company to recognize the Union as the exclusive collective bargaining representative for the units named in the contract "for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment." The Union's position was that by this clause General Electric agreed as a contractual matter to bargain with the Union in accordance with its duty to bargain under Section 8(a)(5) of the Labor-Management Relations Act.[3] The Union then urged that the Act, and

---

[3]During the trial the Union claimed, in addition, that General Electric also violated the contract by not bargaining on the individual merits of each discharge under the grievance procedure established by the contract. The District Court found, as a matter of fact, that General Electric did in fact negotiate in good faith concerning the policy both through the grievance machinery and otherwise (Finding of Fact No. 6). The petition does not claim that this finding was

therefore the contract, should be construed as prohibiting General Electric from issuing the discharge policy without advance discussion with the Union.

The District Court resolved this question on the merits in favor of General Electric, holding as a fact that neither the recognition clause nor any other provision of the collective bargaining agreement required advance discussion with the Union (Finding of Fact No. 4). The Court of Appeals held that the District Court did not have jurisdiction to decide this question on the merits because the Union's claim was in effect that General Electric's promulgation of the policy without advance bargaining was an unfair labor practice—an issue which fell within the exclusive primary jurisdiction of the National Labor Relations Board.

In this Court petitioners contend that the decision of the Court of Appeals is in conflict with the decisions in other circuits, and in addition was incorrectly decided. These contentions are without merit. The decision of the Court of Appeals on the question is clearly correct, is based upon and limited to the unique contentions made by the Union, and is not in conflict with the decisions cited by petitioners.

Since the Union recognition clause did not contain any express requirement that obligated the Company to discuss the discharge policy with the Union prior to promulgation, as is clear both from the terms of Article I itself and the

---

not supported by the evidence. The provisions of the contract establishing the grievance machinery were, moreover, purely procedural provisions and did not touch upon the crucial question here of what subject matters, if any, the Company would have to discuss with the Union in advance of taking action on them. The Court of Appeals assumed that if the contract raised any duty to bargain at all, the duty was, as the Union contended, the statutory duty to bargain established by Section 8(a)(5) of the Labor-Management Relations Act. Thus the Court of Appeals said:

> "To say the Company violated its duty to bargain with the Union is to say that it committed an unfair labor practice. . . . The claim is therefore within the exclusive primary jurisdiction of the National Labor Relations Board."

findings of the District Court, the Union must rely on a more tenuous theory. It contends here as it did in the Court of Appeals that a standard recognition clause such as this, making use of the statutory terminology relating to bargaining,[4] reads into the contract the requirements of the Labor-Management Relations Act. From this it argues that the unilateral promulgation of the discharge policy constituted an unfair labor practice within the meaning of that Act and hence is prohibited by the Article. The basic issue of law thus presented is whether the Company's conduct constituted an unfair labor practice—a question which Congress empowered the National Labor Relations Board to determine under the Act and which it has in the past determined only after the most careful expert analysis of all the surrounding circumstances.[5]

If the Union's position on this were accepted, the existence of the routine recognition clause in any collective bargaining agreement would give a union a choice of proceeding in the District Court under Section 301 of the Labor-Management Relations Act or of petitioning the National Labor Relations Board for relief under Section 8(a)(5) of the statute. In either forum the question would

---

[4]Recognition articles such as this are included in collective bargaining contracts as a matter of course and indeed are required by decisions of the Board. Matter of Inland Lime & Stone Co., 24 NLRB 758, 772-773 (1940); Matter of McQuay-Norris Manufacturing Co., 21 NLRB 709, 715 (1940), enforced 116 F. 2d 748 (7th Cir. 1941), cert. denied 313 U. S. 565; Matter of Kellogg Switchboard & Supply Co., 28 NLRB 847, 863-864 (1940). Cf. H. J. Heintz Co. v. NLRB, 311 U. S. 514.

[5]National Labor Relations Board's decisions under Section 8(a)(5) of the Act show that the Union was also in error in its construction of the Act, and that the Act did not require General Electric to bargain with the Union in advance of its promulgation of the discharge policy challenged in this case. See McDonnell Aircraft Corp., 109 NLRB 930 (1954); Massey Gin & Machine Works, 78 NLRB 189 (1948); Betty Brooks Co., 99 NLRB 1237 (1952); Op. Gen. Counsel NLRB, Case No. 799, 32 LRRM 1620 (1953) (unilateral decrease in wages and change in work loads); Op. Gen. Counsel NLRB, Case No. 883, 33 LRRM 1234 (1954) (unilateral change in policy of pay during absences).

be the same; the question would be whether the company's actions were in violation of the duty to bargain imposed upon it by the Act. The contract would be involved only because the contract would be construed to incorporate the statutory duty, and the breach of contract would depend on establishing a breach of the statutory duty.

The Court of Appeals was clearly correct in deciding that the National Labor Relations Board had primary and exclusive jurisdiction to determine whether particular action constituted a refusal to bargain in this sense. A determination of the validity of the Union's theory depended solely upon what the national labor policies established by the National Labor Relations Board under the Labor-Management Relations Act demand of a company. In effect, the Union was asking the court to decide how the Board would have applied the Act to the facts of the case if the Union had chosen to file an unfair labor practice complaint.

The situation presented by this case is thus far different from that presented by a case in which a party is alleged to have breached some specific provision of a contract imposing on him an express duty which arises independently of the existence of the Labor-Management Relations Act. It may well be that if a company and a union agree to include in their contract a clause specifically prohibiting the company from taking particular action which might also constitute an unfair labor practice, breach of that clause would be subject to redress in the district courts under Section 301. This might be true, for example, in the case of an alleged breach of a provision which by its terms prohibited promulgation of new discharge rules without advance discussion with the union. In such a case, the contractual obligation would exist wholly independently of the unfair labor practice provisions of the statute; the union would be in a position to bring suit under the contract without reference to whatever requirements may be imposed by the Labor-Management Relations Act.

It is for this reason that there is no conflict between the decision of the Court of Appeals below and the decisions relied on by petitioners.

The only case cited by petitioners which directly involves any issue of primary jurisdiction is *Independent Petroleum Workers of N. J. v. Esso Standard Oil Co.*, F. 2d , 38 LRRM 2307 (3rd Cir. June 26, 1956).[6] That case involved a contract clause which expressly provided that if the company established a new job classification "negotiations on the salary shall be conducted" between the company and the union. The court held that the jurisdiction of the National Labor Relations Board over refusals to bargain as an unfair labor practice did not deprive the District Court of jurisdiction over a suit for breach of this explicit contract clause. The breach of contract was, of course, not dependent upon the fact that the company's refusal to negotiate the salary rate for the new job classification might also constitute an unfair labor practice. There was, therefore, not involved any of the risks of diversity or conflict of remedies which the primary jurisdiction doctrine was designed to avoid. The court's determination whether the contract was breached would not require it to interpret the unfair labor practice provisions of the statute in any way. This is in sharp contrast with the situation presented by this case where the alleged contractual duty to bargain is

---

[6]Since the filing of the petition in this case the point raised by the first question presented was discussed also in dictum in the decision of the Court of Appeals for the First Circuit in United Electrical, Radio & Machine Workers of America v. Worthington Corp., F. 2d , 38 LRRM 2507 (1st Cir. July 31, 1956). While discussing the question, however, the court grounded its decision on the existence of an alleged breach of contract which involved no unfair labor practice. With reference to the primary jurisdiction problem the court stated that "we do not analyze the facts of this case as presenting a direct example of a charge of conduct constituting both an unfair labor practice and a contract breach". The court also noted that the case had significant differences from this case.

identical to and co-terminal with the claimed statutory duty to bargain and the claim that there was a breach of the recognition clause accordingly depends upon establishing a violation of Section 8(a)(5) of the Labor-Management Relations Act.

There is accordingly no conflict between the decision of the Third Circuit and the decision of the Court of Appeals for the District of Columbia in this case. The Third Circuit decision, although rendered over a month after the decision of the Court of Appeals in this case, did not refer to it. The Third Circuit was able to reach the conclusion it did because the District Court would be able to decide the breach of contract question without creating the confusion and disorder which it is the purpose of the primary jurisdiction doctrine to avoid. Other courts, while not deciding the question directly, have reached the same conclusion as did the Court of Appeals in this case where action by a district court would necessarily involve interpretation of the Labor-Management Relations Act and thus invasion of the function of the National Labor Relations Board. See *Anson* v. *Hiram Walker & Sons*, 222 F. 2d 100, 105 (7th Cir. 1955), *cert. denied* 350 U. S. 840; *Textile Workers Union* v. *Arista Mills Co.*, 193 F. 2d 529, 532-533 (4th Cir. 1951); *American Optical Co.* v. *Andert*, 108 F. Supp. 252 (W. D. Mo. 1952); *United Packing House Workers of America* v. *Wilson & Co.*, 80 F. Supp. 563, 569 (N. D. Ill. 1948). In the *Arista Mills* case, the court said (193 F. 2d at 533):

> "We do not mean to say that, merely because a bargaining contract may forbid unfair labor practices, the courts have jurisdiction to afford relief against them under guise of relieving against breaches of contract. . . . We think it clear that parties may not by including a provision against unfair labor practices in a bargaining agreement vest in the courts

> jurisdiction to deal with matters which Congress has placed within the exclusive jurisdiction of the National Labor Relations Board."

The other cases cited by petitioners are not in point. In *NLRB* v. *Standard Oil Co.*, 196 F. 2d 892 (6th Cir. 1953) no suit for breach of contract was involved at all. The case of *Post Publishing Co.* v. *Cort*, Mass. , N. E. 2d , 38 LRRM 2198 (1956) is not a federal decision and in any event holds only that the arbitrator would have jurisdiction "to sweep away grounds of dispute which are not within any preempted field." *United Telephone Co.*, 112 NLRB 779 (1955), *Spielberg Manufacturing Co.*, 112 NLRB 1080 (1955), and *McDonnell Aircraft Corp.*, 109 NLRB 930 (1954), involve the application of national labor policies developed by the Board in the exercise of its primary jurisdiction. Nothing in the cases suggests that the primary jurisdiction does not exist.

Petitioners fail to come to grips with the fact that any other decision by the Court of Appeals in this case would have been inconsistent with the spirit and conception of national labor legislation as intended by Congress and defined by this Court. This Court has not yet considered a case where the primary jurisdiction doctrine applied in a suit based on a collective bargaining agreement. Its pertinent decisions, however, uniformly demonstrate that the doctrine would apply where, as here, the breach of contract action is based on the allegation that a section of the Labor-Management Relations Act has been incorporated by reference into the agreement so that determination of the issue would require the court to construe and apply the provisions of the Act to the disputed facts of the case before any recourse was had to the National Labor Relations Board. See *Garner* v. *Teamsters, Chauffeurs & Helpers Local*

Union 776, AFL, 346 U. S. 485, 490-491; *Amalgamated Utility Workers, CIO* v. *Consolidated Edison Co.*, 309 U. S. 261, 264-265. In the *Garner* case the Court stated (346 U. S. at 490-491):

> "Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."

B. The Contract Under Which the Controversy Concerning the Promulgation of the Policy Arose Is No Longer in Effect and This Aspect of the Controversy is Accordingly Moot.

Thus far we have shown that the very narrow primary jurisdiction question presented by the facts of this particular case is itself not an appropriate question for certiorari review under the rules of this Court. While in a proper case there may be a substantial question of some difficulty as to the respective jurisdictions of the District Courts and the National Labor Relations Board under Section 301 and Section 8 of the Labor-Management Relations Act, no such question is presented here because no breach of contract independent of the statute exists in this case.

There is, however, a separate reason why the primary jurisdiction question presented here is inappropriate for certiorari review in this particular case, even if it is assumed that the question itself is a proper one for such review. The contract whose meaning is at issue is no longer in effect, so that review of the case by this Court to decide the juris-

dictional issue could not in any circumstances lead to a resolution of the merits of the controversy which existed in the District Court. The contract under which the suit was brought has been replaced by a contract in which the recognition clause is agreed to place no obligation on the Company beyond the obligation stated in the clause to recognize the Union as the exclusive collective bargaining representative for the listed bargaining units.[7]

The mootness of the controversy on the merits is pointed up by the relief asked by the Union. The Union's petition in this Court points out that it does not seek an injunction, but merely "the established legal remedy of declaratory judgment" (petition, page 16).

If this Court should take the case in order to decide the jurisdictional issue, and should decide that issue in accordance with the contentions of the Union, the case would then have to be remanded to the Court of Appeals to consider whether the District Court had properly decided the bargaining controversy on its merits. This would require the Court of Appeals to review the facts found by the District Court, and particularly the facts on the history of the contract clause involved and on the bargaining and negotiation between the parties which surrounded the promulgation of the policy. Even if the Court of Appeals in making this review should reverse the findings of the District Court that whatever obligations were imposed by the contract had been performed, its decision could lead only to a declaratory judgment as to the meaning of a clause in a contract which is no longer in existence, which does not govern any existing relations between the parties, and whose meaning accordingly has no present significance.

---

[7]The letter in which the agreement as to the meaning of the recognition clause is set forth states that it shall not prejudice the rights of either party in this case. This statement in the letter agreement, however, obviously has no bearing on the question of the mootness of the controversy as to the meaning of the recognition clause in the expired contract.

It is obvious from this that a review by this Court of the first question presented by the petition could not lead to the resolution of any existing controversy. The question of bargaining has no relation to the rights of the individual employees discharged under the policy. It is a question which by its nature could be raised only by the Union, and the relief sought by its nature is intended only to serve as a guide for future conduct of the parties. In this case there will be no future conduct under the old contract, and a declaration of what that contract meant would have no effect on the conduct of the parties under the new contract. The Declaratory Judgment Act is by its terms inapplicable. In asking this Court to review the question, the Union is asking it to decide a legal issue which is academic for purposes of this litigation, and the question is an inappropriate one for the exercise of certiorari jurisdiction for that reason.

III

THE EVIDENTIARY RULING OF THE DISTRICT COURT ON THE SENATE CLAIM OF PRIVILEGE PRESENTS NO SUBSTANTIAL QUESTION AND IS ALSO INAPPROPRIATE FOR REVIEW BY WRIT OF CERTIORARI

A. The Decision of the District Court Is Clearly Correct, Is Not in Conflict With Any Other Decisions, and Accordingly Does Not Present a Question Appropriate for Review by Certiorari

As indicated in the statement of facts, the District Court, on the basis of specific findings of fact, determined that petitioners had failed to establish the conspiracy which was alleged to violate the Civil Rights Act (Findings of Fact Nos. 1, 2, 11). The Court of Appeals in its opinion stated that these findings were based on "sufficient evidence" and again ruled that "plaintiffs failed to prove any con-

spiracy." The narrow question raised by the petition here is whether an evidentiary ruling by the District Court in the course of taking evidence pertaining to the alleged conspiracy was correct.

Petitioner Nelson seeks here as he did in the Court of Appeals to challenge the action of the District Court in honoring a formal claim by the United States Senate of its privilege over certain subpoenaed documents and witnesses (J. A. 221). This issue was vigorously briefed and argued before the Court of Appeals. Petitioner's contention, while not mentioned in the opinion, was obviously discarded by the court since it sustained the District Court's determinations on the conspiracy issue.

The District Court's ruling was, moreover, clearly correct. Even if petitioner can establish, which is very doubtful, that the Senate resolutions in question were not outright claims of privilege but left open the possibility that that the claim of privilege would be relaxed in some particular should the court by ruling indicate that this was desirable in the interest of the litigation, there was no occasion for the court to ask the Senate to consider further the position it had taken in asserting its privilege. There was no showing made that the evidence denied petitioner by the claim of privilege—if indeed any such evidence ever in fact existed —was necessary to the proof of his case and petitioner wholly failed to lay the necessary basis for pressing his demands against the claim of privilege which was so explicitly asserted by the Senate through unanimous resolutions (J. A. 201a-219a).

The District Court's ruling is squarely supported by the recent decision of this Court in *United States* v. *Reynolds*, 345 U. S. 1. There, in ruling on a parallel claim of privilege by the Executive Branch against judicial discovery, the claim of privilege was upheld in part because "where necessity is dubious a formal claim of privilege . . . will have to

prevail" and in the circumstances of that case "necessity was greatly minimized by an available alternative, which might have given respondents the evidence to make out their case without forcing a showdown on the claim of privilege" (345 U. S. at p. 11). See also Opinion of Chief Justice Marshall in the Trial of Aaron Burr, Case No. 14,694, reported at 25 Fed. Cas. 191-192 (C. C. D. Va. 1807).

The record shows that plaintiffs failed to make any attempt to prove the facts they alleged on the conspiracy issue by any of the alternative sources available to them. The witness Stevens, who was at the luncheon in Albany at which plaintiff claimed the conspiracy originated, was deposed and questioned at length by plaintiffs' counsel (J. A. 253-273). This deposition wholly failed to support petitioners' assertions. Another employee of General Electric present at the Albany luncheon was Mr. LaForge. He was tendered in open court to plaintiffs for examination and plaintiffs' counsel refused to examine him (J. A. 274). Another General Electric employee mentioned in connection with the Congressional hearings at Albany was William J. Barron (J. A. 224). Mr. Barron took the stand at the trial in behalf of the defense and was not examined at all by plaintiffs' counsel (J. A. 521-522). Mr. Cordiner, President of General Electric, who was found by the District Court to be the moving spirit and primary author of the policy under attack (J. A. 785) also gave testimony negating any opportunity for a conspiracy and was not cross-examined at all on this subject (J. A. 406-431). Finally, Mr. Roy Cohn, one of the Committee staff members assertedly involved in the alleged conspiracy, who was no longer an employee of the Senate Committee at the time of the trial, was not deposed.

In the light of this record, plaintiffs' actions can only be construed as a deliberate attempt to take advantage of the claim of privilege to create an issue on appeal which would

not otherwise be available to them. This attempt should fail as a matter of policy and as a matter of law. There is ample precedent for the Senate Resolution[7] and the District Court acted properly under the circumstances in flatly recognizing this action by a coordinate branch of the Government in pursuance of its separate legislative power.

B. This Case Does Not In Any Event Properly Involve Any Question of the Validity of the District Court's Decision.

The question of the validity of the District Court's evidentiary ruling is also inappropriate for review by certiorari because the issue of the existence of the alleged conspiracy is not properly presented by the case at all.

First, there was no plaintiff to present the issue to the court. The plaintiff Union did not and could not claim any cause of action under the Civil Rights Act. This claim was made solely by plaintiff Nelson who sued individually in a spurious class action on behalf of himself and all other employees of the General Electric Company similarly situated. The District Court concluded that plaintiff Nelson failed to satisfy the requirements of Rule 23(a) of the Federal Rules of Civil Procedure insofar as he purported to sue on behalf of other employees for damages from alleged violation of the Civil Rights Act. The court made a specific finding of fact which showed that plaintiff Nelson was not a member of the class for which he purported to sue, and that he failed to offer any evidence to show that

---

[7] 6 Cannon's Precedents § 587 (1936); 3 Hinds' Precedents § 2663 (1907). For wording of recent resolutions, see, *e.g.*, H. R. Res. 193, 82nd Cong., 1st Sess., 97 Cong. Rec. 3800 (1951); H. R. Res. 105, 83rd Cong., 1st Sess., 99 Cong. Rec. 498 (1953); H. R. Res. 469, 83rd Cong., 2nd Sess., 100 Cong. Rec. 3046 (1954); H. R. Res. 296, 84th Cong., 1st Sess., 101 Cong. Rec. 8412 (daily ed. July 1, 1955). See also Memorandum on Separation of Powers, 14 Fed. B. J. 73 (1954); 40 Ops. Att'y Gen. 45 (1949).

he in fact represented anyone but himself (Finding of Fact No. 12). Neither Nelson nor any of the other members of the alleged class appeared at the trial or gave evidence by deposition.

Finally, while neither court below ruled on the point, respondent has contended from the outset of the litigation that the conspiracy alleged (see pp. 9-10 of the petition) does not fall within the narrow statutory provision of the Civil Rights Act. Assuming arguendo and contrary to the findings of the two lower courts that the conspiracy claimed in fact existed, it is apparent from the decisions of this Court that plaintiff was not deprived of any right or privilege of a citizen of the United States. See *Slaughter House Cases*, 16 Wall. 36; *Twining* v. *New Jersey*, 211 U. S. 78, 99; *United States* v. *Cruikshank*, 92 U. S. 542; *Hurtado* v. *California*, 110 U. S. 516; *Maxwell* v. *Dow*, 176 U. S. 581; and *Hodges* v. *United States*, 203 U. S. 1. Nor was there any injury to his person or property which may be constitutionally protected by the Congress. Compare *United States* v. *Harris*, 106 U. S. 629 and *Baldwin* v. *Franks*, 120 U. S. 678 with *Collins* v. *Hardyman*, 341 U. S. 651, 657.

Conclusion

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

GERHARD A. GESELL
BURKE MARSHALL
701 Union Trust Bldg.
Washington 5, D. C.

WILLIAM J. BARRON
570 Lexington Avenue
New York 22, New York

Attorneys for Respondent

Dated: September 19, 1956

APPENDIX A

Findings Of Fact And Conclusions of Law of the District Court

1. The Statement of Policy was issued by the President of the General Electric Company on December 9, 1953 after thorough consideration by him and consultation with appropriate officials of the Company. Both the decision to issue such a policy and the decision as to its substance were made solely as a Company matter without any consultation or communication with any Government representatives or other persons outside the Company. The Statement of Policy was not requested, ordered or required by any Government agencies or any Government authority as a condition for the granting or maintaining of any Government contracts. The Company recommended to Government agencies that such agencies should determine and direct when an employee should be excluded from civilian as well as classified military work, and such recommendations were rejected by the Government agencies.

2. The Statement of Policy was issued by reason of the conduct of certain Company employees in appearing before duly authorized Congressional committees and asserting their privilege against self-incrimination in refusing to respond to questions pertaining to Communist affiliations, espionage or sabotage. By such acts these employees, both in the opinion of the management and in fact, subjected General Electric to widespread adverse publicity and adverse criticism from stockholders and customers, injured the Company's good name, threatened the Company with the loss of good will, created unrest among Company employees, disrupted plant morale and raised grave doubts as to the security of the Company's plants which

were shown to be important to the national defense. At the time the policy was promulgated, General Electric also recognized that it was confronted with the prospect that Congressional committees would hold further hearings involving its employees on the subject of Communism, espionage and sabotage. Several such further hearings in fact subsequently took place.

3. The Statement of Policy was applied by General Electric in accordance with its terms to all employees of the Company whether or not members of plaintiff Union or any Union. The Policy was not designed nor carried out for the purpose of or with the effect of discriminating against any particular union or the members of any particular union or any particular employee, including plaintiff Nelson, by reason of union affiliation or activity. Plaintiff Nelson, at the time of his suspension and discharge, and for a considerable period prior to that time was president of the Local at General Electric's Erie plant. He continued to be president of that Local following his suspension and discharge and there was no change in his Union activities.

4. The Company promulgated, issued and put into operation the Statement of Policy without prior consultation or bargaining with the plaintiff Union or any of its representatives, or any of the many other unions with which the Company had contracts. There was no provision of the National Agreement between the Company and the Union which required such advance consultation. Article I of the National Agreement which has appeared in various forms in different prior National Agreements between the Company and the Union obligates the Company to recognize the Union as the sole and exclusive bargaining agent of the employees covered by the Agreement, for the pur-

poses of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment. This Article was never intended by the parties to require General Electric to give the Union advance notice of rules relating to discharge. It has been the practice of the Company under the present and prior National Agreements to issue rules stating grounds for immediate discharge without prior consultation with the Union. It was stipulated by the parties that the Company had not, prior to the issuance of the Statement of Policy, ever issued instructions nationally with respect to causes for discharge.

5. The National Agreement does not specify types of conduct which the Company may make the basis for immediate discharge and there never has been any agreement or understanding between the Company and the Union limiting the Company's right to determine what types of conduct should result in immediate discharge. Proposals by the Union to include such limitations in prior National Agreements were rejected by the Company. It has been the intention of the parties, and the National Agreement contemplates, that the Company will take such disciplinary action as it deems appropriate and that the Union or individual employees may then challenge the Company's action through the grievance machinery provided in Article XV of the National Agreement. The National Agreement provides that an employee is entitled to a warning notice and then to a notification one week in advance of any penalty discharge, "except for discharges for obvious cause."

6. When the Union protested the issuance of the Statement of Policy shortly following its promulgation, General Electric recognized the Union as the exclusive bargaining agent for the employees covered by the contract and, in

accordance with the Union's request, immediately scheduled conferences with officials of the Union to discuss the matter. Officials of General Electric met with representatives of the Union, heard their grievances fully and bargained in good faith concerning the Policy. The only proposal made by the Union was that the Policy be dropped and discussions then be instituted. This proposal was rejected by the Company after conferences between the Company and the Union. General Electric was, at all times requested, ready and willing to negotiate and did, in fact, negotiate concerning the Policy, the need for it and its terms and operation with Union representatives both through the grievance machinery established by Article XV of the National Agreement and otherwise.

7. Warning Notices were not given employees discharged pursuant to the Policy. The reference to the Warning Notice procedure was incorporated in and was continued in the National Agreement at the instance of the Company, and Warning Notices were intended by the parties under the National Agreement to be used, and have been used, in those situations where an employee's conduct on the job could perhaps be improved if he was given a notice of deficiency and an opportunity to correct it. The record discloses that the parties intended and recognized that General Electric did not by the National Agreement bargain away its right to discharge immediately without any Warning Notice employees the Company considered so undesirable that they should be immediately removed from the plant.

8. There is no provision in the National Agreement which makes discharges subject to arbitration except as to issues arising under Article IV relating to discrimination for union activities. The question whether discharges gen-

erally should be subject to arbitration was frequently discussed between the parties in the negotiation of the present and prior National Agreements and the parties disagreed on this point. The Company rejected proposals of the Union designed to make discharges generally subject to arbitration. The National Agreement contemplates that in the event the Company and the Union cannot settle a question as to discharge through the grievance machinery provided in Article XV, the Company's decision as to the penalty will stand and the Union has the right to strike under Articles XVI(2) and XVII(1).

9. The parties have not agreed to submit to third party review, either by a court or arbitrator, the propriety of discharges generally or other penalties imposed by the Company in disciplinary cases.

10. In the light of the entire record the assertion by Company employees of the privilege against self-incrimination under circumstances which brought the Statement of Policy into play justified the Company in immediately applying the Statement of Policy to such employees. Their discharges were discharges for "obvious cause". Under the National Agreement no week's notice was required.

11. Plaintiffs failed to prove any concerted action, conspiracy, plan or program between the Company and members of the staff of the Permanent Sub-Committee on Investigations of the Senate Committee on Government Operations to deprive plaintiff Nelson or any other employee of General Electric of his civil rights or any understanding or agreement between the Company and such staff members in any way relating to, affecting or bearing on employment or discharge by General Electric. Officers of General Electric named in the complaint as having par-

ticipated in the alleged conspiracy gave evidence negating the existence of the conspiracy and were not cross-examined by plaintiffs on this issue. Other witnesses available in court to plaintiffs on this issue were not called or examined by them.

12. Insofar as the claim of conspiracy is concerned, plaintiff Nelson is not a member of the class for which he purported to sue. He is not shown to have appeared before the Permanent Sub-Committee on Investigations of the Senate Committee on Government Operations and no claim is made of any conspiracy involving the staff or members of the different Committee before which he did appear. Neither plaintiff Nelson nor any member of the alleged class testified at the trial. No evidence was offered to show that plaintiff Nelson in fact represented anyone but himself.

Conclusions of Law

1. General Electric Company did not violate Articles I, IV or XV or any other provision of the National Agreement between the Company and the United Electrical, Radio and Machine Workers of America (Exhibit A to the Complaint) in promulgating the Statement of Policy (Exhibit B to the Complaint) and discharging employees, including plaintiff Nelson, pursuant to it.

2. Neither the Statement of Policy nor the discharge of employees, including plaintiff Nelson, pursuant to it violates the Fifth Amendment or any other provision of the Constitution of the United States.

3. General Electric did not engage in a plan or conspiracy with anyone to deprive plaintiffs, or any employees of General Electric, of rights, privileges or immunities guar

anteed or secured by the Constitution of the United States. Neither plaintiff Nelson nor any individual for whom he claimed to sue was in fact deprived of having or exercising any right or privilege of a citizen of the United States. No violation of U. S. C. A. Title 42, §§ 1983, 1985(3) or U. S. C. A. Title 18, § 241 was established.

4. In view of the facts contained in Finding 12, plaintiff Nelson failed to satisfy the requirements of Rule 23(a) insofar as he purported to sue on behalf of other employees for damages from alleged violations of U. S. C. A. Title 42, §§ 1983, 1985(3) or U. S. C. A. Title 18, § 241 arising from the alleged conspiracy between the Company and members of the staff of the Permanent Sub-Committee on Investigations of the Senate Committee on Government Operations.

CHARLES F. MCLAUGHLIN,
U. S. D. J.

Dated: February 15th, 1955

Seen: JOSEPH FORER
Attorney for Plaintiffs

APPENDIX B

Additional Statutes and Rule Involved

Labor-Management Relations Act, Sec. 301(a), 29 U.S.C.A. § 185(a):

(a) Suits for violation of contracts between an employer and a labor organization representing emoplyees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title III, § 301, 61 Stat. 156.

District of Columbia Code, Title 11, Sec. 755(a):

(a) The Municipal Court for the District of Columbia, as established by this subchapter shall consist of a criminal and a civil branch. The court and each judge thereof shall have and exercise the same powers and jurisdiction as were heretofore had or exercised by the Police Court of the District of Columbia or by the Municipal Court of the District of Columbia or the judges thereof on the effective date of this subchapter and in addition the said court shall have exclusive jurisdiction of civil actions, including counterclaims and crossclaims, in which the claimed value of personal property or the debt or damages claimed, exclusive of interest, attorneys' fees, protest fees, and costs, does not exceed the sum of $3,000 and, in addition, shall also have exclusive jurisdiction of such actions against executors, administrators and other fiduciaries: *Provided, however,*

That the District Court of the United States for the District of Columbia shall have jurisdiction of counterclaims and crossclaims interposed in actions over which it has jurisdiction. The court shall also have jurisdiction over all cases properly pending in the Municipal Court of the District of Columbia or the Police Court of the District of Columbia on the effective date of this subchapter.

Federal Rules of Civil Procedure, Rule 23(a):

(a) *Representation.* If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.